

JOURNAL
OF
COMPARATIVE LEGISLATION
AND
INTERNATIONAL LAW

EDITED FOR

THE SOCIETY OF COMPARATIVE LEGISLATION

BY

Sir ARNOLD McNAIR, C.B.E., K.C., F.B.A., LL.D.

Assisted by Professor H. C. GUTTERIDGE, K.C.

"A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed than in examining the laws and customs of foreign nations."

SAMUEL JOHNSON.

THIRD SERIES VOL. XXIX PARTS III & IV

LONDON:
SOCIETY OF COMPARATIVE LEGISLATION
26, OLD BUILDINGS, LINCOLN'S INN, LONDON, W.C.2

1947

[All Rights reserved]

JOURNAL

COMPARATIVE LEGISLATION

AND

INTERNATIONAL LAW

EDITED BY

*All communications to be addressed to the Hon. Editor,
26, Old Buildings, Lincoln's Inn, London, W.C.2.*

The Annual Subscription to the Society is one guinea. (Canada and U.S.A. \$5.)

By ARNOLD McNAIR, C.B.E., K.C., F.B.A., LL.D.
Assisted by Professor H. C. GUTTERIDGE, K.C.

A grammar and glossary of the terms and expressions used in comparative legislation, and a list of the principal works on the subject, are given in the Appendix. The Glossary is arranged in alphabetical order, and the terms are explained in the most concise and accurate manner possible.

THIRD SERIES VOL. XXIX PARTS III & IV

SOCIETY OF COMPARATIVE LEGISLATION
26, OLD BUILDINGS, LINCOLN'S INN, LONDON, W.C.2.

Printed in England by
Harell, Watson & Viney, Ltd., London and Aylesbury

12408-47

CONTENTS OF VOLUME XXIX

PARTS III AND IV

PAGE

THE TREATMENT OF "FRUSTRATION OF CONTRACT" IN FOREIGN LEGAL SYSTEMS.	
AMERICAN LAW	1
Contributed by PROFESSOR A. L. CORBIN.	
SOVIET LAW	9
Contributed by PROFESSOR M. M. AGARKOV.	
URUGUAYAN LAW.	13
Contributed by DR. EDUARDO J. COUTURE.	
LATIN AMERICAN LAW	15
Contributed by HIS EXCELLENCY JUDGE J. P. AZEVEDO.	
THE PROJECTED CODIFICATION OF HINDU LAW	19
Contributed by PROFESSOR S. VESEY FITZGERALD, LL.D.	
MALTESE LAW	32
Contributed by J. M. GANADO, Esq., LL.D.	
RULES OF EVIDENCE UNDER THE NEW ITALIAN CIVIL CODES	39
Contributed by H. A. HAMMELMANN, Esq.	
ENEMY LEGISLATION AND JUDGMENTS IN LIBERATED COUNTRIES. ¹	
BELGIUM	46
Contributed by PROFESSOR PAUL DE VISSCHER,	
NETHERLANDS	53
Contributed by K. JANSMA, Esq.	

NOTES :	
Sir John Peden	55
Dinner to Lord Macmillan	55
Allied Conferences during 1943 to 1945	55
The Legal Status of Germany	56
Peace Treaties	56
German Assets in Switzerland	56
Provocation in the Law of Tanganyika. O. T. Hamlyn	57
Conscientious Objectors in Foreign Countries. E. L. Johnson	59
Legislation in St. Lucia. Keith Alleyne	59

NOTICES OF BOOKS :	
Farnsworth, A. <i>Income Tax Case Law.</i> M.	61
Moore, John Bassett. <i>Collected Papers.</i> A. D. McN.	61
Quekett, Sir Arthur. <i>The Constitution of Northern Ireland.</i> J. A. Stainton	62
Wade, E. C. S., and Phillips, G. Godfrey. <i>Constitutional Law.</i> Third Ed.	
D. L. Keir	63
Schulz, F. <i>History of Roman Legal Science.</i> D. Daube	65

¹ Further articles in this series will appear in ensuing numbers.

NOTICES OF BOOKS—*continued*

PAGE

Salmond, Sir John. *Principles of the Law of Contracts*. Second Ed. by James Williams. C. J. Hamson 66

Evans, Luther H. *The Virgin Islands*. Sir Douglas Jardine 67

The Development of International Law. F. N. Keen 70

Fredericq, Louis. *Traité de Droit Commercial Belge*, Vol. I. H. C. Gutteridge 72

British Year Book of International Law, 1944 and 1945; Annual Digest and Reports of International Law Cases; Oppenheim. *International Law*.

C. H. N. Waldock 73

Parkinson, Cosmo. *The Colonial Office from Within*. H. J. W. 77

Gurvitch, Georges. *Sociology of Law*. R. H. Graveson 78

Hill, Norman. *Claims to Territory in International Law and Relations*. Norman Bentwich 79

Cory, Hans and Hartnoll, M. M. *The Customary Law of the Haya Tribe*. F. Longland 80

Studies in Polish and Comparative Law. K. Lipstein 81

Schwarzenberger, G. *International Law*, Vol. I. C. H. N. Waldock 81

Meek, C. K. *Land Law and Custom in the Colonies*. R. de Z. Hall 83

Allen, C. K. *Law in the Making*. Fourth Ed. H. A. H. 84

Hannan, J. P. *Principles of Income Taxation*. A. Farnsworth 85

Schnitzer, Adolph F. *Vergleichende Rechtslehre*. K. Lipstein 87

La Jurisprudence Hellénique en matière de Droit International Privé en 1941. K. Lipstein 88

Accioly, Hildebrando. *Tratado de Derecho Internacional Publico*. E. J. Cohn 89

Sara, Albert. *La Responsabilité du Fait des Choses Inanimées*. F. M. Goadby 90

L'Egypte Contemporaine. F. M. G. 91

Revue Egyptienne de Droit International. F. M. G.

FRUSTRATION OF CONTRACT IN THE UNITED STATES OF AMERICA

[By PROFESSOR ARTHUR L. CORBIN of Yale University.]

WHEN Paradine sued Jane in an action of Debt for three years' rent in arrears, Jane did not plead impossibility of performance as a defence, although Aleyn reports that the court said that it would not be a good one. His plea is reported thus: "that a certain German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from July 19, [1643,] till the Feast of the Annunciation, [1646,] whereby he could not take the profits." The defendant's demurrer to this plea was sustained.¹

Prince Rupert was, indeed, an alien; and in his army there were some German soldiers, as is customary in loyalist armies defending a king against his revolutionary subjects. Neither Rupert nor his uncle Charles I would have admitted that he was an "enemy to the king and kingdom"; but the demurrer admitted it, quite to the satisfaction of the judges sitting at Westminster in 1647 with the protection of Parliament and the London trained-bands. No doubt the partisans of the Commonwealth were well satisfied that Jane should pay the rent, even though "he could not take the profits."

Nothing appears in Aleyn's report to show that the foregoing facts played any part in the court's decision; for, in addition to the *dictum* that there is a "difference" between duties that are created by the law and duties that are voluntarily assumed by contract, respecting impossibility as an excuse, we are told that "Another reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor." Of course it is very unlikely that Rupert and Charles had handsomely rewarded Jane for the use of the mansion house and stables; but if such had been the case, the landlord would have had no right to an increased rent.

According to the facts pleaded, the tenant's defence was the fact that his purpose in leasing the land had been frustrated by *force majeure*. If Jane had sued Paradine for breach of the latter's covenant of quiet enjoyment (it does not appear that there was such a covenant), the latter's plea would have been impossibility of the performance promised, caused by the *force majeure* of an hostile army.

It does not appear that either the *dictum* or the decision in *Paradine v. Jane* has been in terms overruled. About two centuries later Blackburn was able to disregard the *dictum* (to the approval of everyone since then) while he appeared to accept it as a correct statement of law; and exactly three centuries later it is clear that certain kinds of "frustration" are a good defence (even in the case of a lease for years rendering rent, if we may believe Lord Simon and Lord Wright). The problem before the lawyer to-day is to determine what "frustrating" facts and events will operate to discharge a contractual duty. Whose purposes must be "frustrated" and what sorts of "frustrating" events will "frustrate" the contract? A wide field indeed for investigation; for we get nowhere by merely saying that a party's contractual duty is discharged by "frustration" of the contract.

The *dictum* that impossibility of performance is no defence was effectively undermined in *Taylor v. Caldwell*, although Blackburn distinguished the facts from those in *Paradine v. Jane* by saying that the written document before him was not a lease, and that there was no "demise," despite the use of the words "let" and "rent" by the parties. He added, however, "Nothing, in our opinion, depends on this." With great candour, he states: "The parties when

¹ *Paradine v. Jane*, Aleyn 26 (1647).

framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract." But the rule (of *Paradine v. Jane*) is applicable only when the promise is "positive and absolute." He finds that the defendant's promise to deliver possession of the hall was subject to an "implied condition," because the parties (without having the matter "in their minds") "must have known" that performance would be impossible if the hall should cease to exist and "must have contemplated such continuing existence as the foundation of what was to be done." Although there was an express promise to let the hall on a definite date, he finds that there was no "express or implied warranty that the thing shall exist," preferring to find an "implied condition" limiting the defendant's duty. Such an "implication," he said, "tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract"; not, indeed, because *these parties* had such an intention, but because "in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition."²

Thus the great judge, without changing a word of the ancient and still repeated rule, drew all of its biting teeth. In all cases alike, the contracting parties "must have known" that performance would be impossible if an unexpected event makes it impossible, and they "must have contemplated" such continuing possibility "as the foundation of what was to be done." He gave in a nutshell several of the explanatory rationalizations of the "frustration" doctrine that appear in the decisions and articles of the present century, including the "implied condition," the "foundation" of the agreement, and the opinions of "men in general" (including the judges) that there "should be such a condition." He does not clearly include the two "hard bargainers" themselves, although he purports to fulfil their "intention." Thus "justice" was served without causing the heavens to fall. Blackburn's extraordinarily clear mind saw the end that must be attained; and there is no reason to suppose that he was guileful enough to use the method without convincing himself that it was intellectually honest and logically sound. It is a method that all of us alike have used, whether with or without guile. Indeed, it renders poor service to the cause of justice to subject the method to clear analysis before the time is ripe; for such analysis may cause an honest judge to apply the ancient rule unaffected by the guileful method. Must not an honest judge apply the "existing law" even in a "hard case"?

It was the *dictum* as to "impossibility" in *Paradine v. Jane* that gave Blackburn trouble, not the court's decision on the plea that the lessee "could not take the profits." In that case the landlord was suing the tenant for non-payment; and no promised performance had become "impossible" in any sense of that abused word. Jane's defence was that his purposes of enjoyment and profit-taking had been "frustrated" by an hostile army; and the court held that the tenant must carry the risk of such a "frustration," however unexpected it may have been. In *Taylor v. Caldwell*, the tenant sued the owner; and the latter's defence was "impossibility" of his promised performance. Had Caldwell been suing Taylor, the cases would have been more nearly parallel; and Taylor's defence would have been "frustration" of his purposes of enjoyment and profit-taking, not the impossibility of making payment.

Before the recognition of bilateral contracts in the sixteenth century, the problems of impossibility and frustration were much less complex. One who promised to compensate for services or goods certainly did not have to pay if an unexpected event prevented the service or the transfer; and no action would lie against the other party for his failure to serve or to transfer, whether his failure was caused by *force majeure* or was obstinately wilful. Having made no

² *Taylor v. Caldwell*, 3 Best & S. 826 (1863).

promise, that party could commit no breach. If, after the service was rendered or the goods transferred, some event made the specific form of compensation impossible, the promisor's enrichment would have been grossly unjust if the impossibility had been held to discharge him from the duty to pay its value in money. This would be equally true in similar unilateral contract transactions of to-day.

For two centuries after bilateral agreements became enforceable the mutual promises, in the absence of express words of condition, were thought to be mutually independent. Failure of performance by one promisor, whether wilful or caused by death or destruction, was no defence in a suit for non-performance of the return promise; the defendant merely had a counter action, and in this counter action "impossibility" should in justice be no defence. As business agreements became increasingly bilateral in character, this circuity of action and counter action was seen to be bootless, and the law of mutual independency became in conflict with the practices and *mores* of men. It was, after much travail, changed by the judges, a change in which Lord Mansfield played an important part, but in the wake of earlier judicial action. This change was effected largely by the method of the "implied condition." Long before the decision in *Taylor v. Caldwell*, Taylor's duty to pay rent was made conditional on his getting the use of the hall. After this rule became established, discharging Taylor in case of failure to get the hall, whether by its destruction or otherwise, it seemed desirable also to change the rule that Caldwell would be liable in damages for non-delivery that was caused by fire or other *force majeure*. Observe that the unexpected event (the fire) "frustrates," without any help from the law or the court, the purpose of Taylor by preventing the attainment of his bargained-for equivalent. The fire would never have "frustrated" Caldwell's purpose (the bargained-for money) except for the change in the rule of law.

The American cases dealing with Impossibility and Frustration are very numerous. Only a few representative ones can here be considered and a few tentative generalizations attempted. In general, the decisions and their justifying reasons have been similar to those of the English courts. The *dictum* in *Paradine v. Jane* was for a long time repeated, while at the same time its actual application has been avoided when the business *mores* appear to make it unjust to compel a promisor to bear all the risks of loss and disappointment by reason of unforeseen events. As in *Taylor v. Caldwell*, this just result has been attained chiefly by the device of the "implied condition."

In a decision rendered by the Supreme Court of Connecticut a few years before *Taylor v. Caldwell*, the reasoning is almost identical with that of Lord Blackburn, although because of a difference in the facts the defendant's duty was held not to be discharged. The defendant had undertaken to erect and complete a school house by a fixed date. Two days before that time the practically completed building was struck by lightning and destroyed. The performance required by the contract was the creation of a new structure, not the delivery of an existing one. It was thought that performance was merely rendered more expensive, not impossible. The school trustees offered to extend the time for performance; but the builder refused to proceed. For this refusal damages were awarded.³ It is highly probable that, if the builder had at once proceeded to rebuild with diligence and had been sued for damages for failure to complete by the agreed date, the destruction by lightning would have been held to be a good defence. Because of this and similar decisions, the risk of destruction of an unfinished building is on the builder; and it is one against which he commonly takes out insurance. The promised performance has become neither impossible nor "commercially impracticable," although completion on time may have become so.

If a performance that has been promised becomes impossible by reason of an un contemplated event such as death of a person or destruction of a thing, a legal

³ *School District v. Dauchy*, 25 Conn. 530 (1857).

prohibition or a governmental interference, the duty of the promisor is discharged. In applying this rule, the meaning of the term "impossibility" has been expanded so as to include "commercial impracticability," danger to life or property, and sometimes to destruction of the contemplated means and sources of supply.⁴ In these cases the American courts do not use the term "frustration of contract," being content to disregard the *dictum* that impossibility is no defence or to find that the promise is "impliedly conditional." If a promisor who is himself excused by impossibility sues the other party for breach of his return promise, the latter's defence is described as "failure of consideration."⁵ There has long been no doubt that, if the latter party has paid part or all of the price or has rendered any other kind of equivalent, the "failure of consideration" gives him a right to Restitution.⁶

Section 288 of the Restatement, Contracts, adopted by the American Law Institute is the only place in which the Institute uses the term "frustration." That section reads thus: "Frustration of the Object or Effect of the Contract. Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing the promise unless a contrary intention appears."

The comment and illustrations that accompany this section make it apparent that it was drafted in reliance chiefly upon English cases and reasoning.⁷ It is entirely distinct from the sections that deal with the effect of impossibility of a promised performance on the promisor's duty, and also from those that deal with the effect of failure of consideration on a promisor's duty. The section is so worded as to apply to cases in which "a desired object or effect to be attained" by either one of the parties is frustrated; and it declares no more than that the duty of the one party who is harmed is discharged. Even that party's discharge is limited to a case in which the "assumed possibility" of the attainment of his object "forms the basis on which both parties" assent to the contract.⁸ The effect of such facts upon the legal duty of the other party is left to the rules as to "failure of consideration."

Further study of the decisions and analysis of their facts have convinced the writer (himself a special adviser of the draftsman) that a section so worded can render very doubtful service in determining future decisions. It can indeed, after decision has been reached on practical (perhaps unexpressed) grounds, be seized upon as an "authority"; but the accustomed fictions are involved in its language and make factual analysis difficult. If the "assumed possibility of a desired object or effect to be attained" by one of the parties ("by either party") is the operative factor, how can it be shown that it "forms the basis on which both

⁴ Restatement, Contracts, Chap. 14.

If by reasonable interpretation the promisor also undertakes indemnification or insurance against the consequences of the impending events, the alternative performance so promised is not impossible and there is no discharge. In some cases the interpretation is a very difficult one.

⁵ In the *Fibrosa* case [1943] A.C. 32, the court was presented with both questions at once, and with a problem of Restitution as well. Fairbairn's duty to make delivery in Poland was discharged by "impossibility," so that Fairbairn committed no breach and was not liable in damages. At the same time, Fibrosa's duty to pay the price was discharged by failure of the agreed equivalent. The total result is "frustration of the contract." In addition, Fibrosa was held to have a right to restitution of the instalment paid in advance.

⁶ Restatement, Contracts, ss. 347-357, and especially s. 468.

⁷ One illustration is drawn directly from *Krell v. Henry* [1903] 2 K.B. 740. A second one is taken from the decision in an inferior New York court that followed *Krell v. Henry*.

⁸ As is so often the case, of unavoidable necessity, this section cannot accurately be described as a Restatement of any previously existing rule. Any system of rules and definitions, whether drawn by a single jurist in his cloister or by a committee of jurists, varies materially from former generalizations. The section properly avoids use of the phrase "object of the contract." A "contract," however that word is defined, has no "object."

parties" assent? When the parties themselves say nothing whatever about the matter, a court can find that it was such a "basis" only by looking into its own mind and conscience as directed by the practices and *mores* of "men in general." Therefore, a stated rule should direct the court's attention toward those practices and *mores* rather than toward the ascertainment of a non-existent intention of the contractors.

In *Taylor v. Caldwell* and the many cases that have followed it, the *dictum* in *Paradine v. Jane* that impossibility of performance is no discharge has been substantially nullified. A beginning has been made also toward breaking down the rule underlying the actual decision in *Paradine v. Jane*—the rule that a contractor's duty is not discharged by an event that prevents the realization of expected profits and reduces the value of a performance that he has received or still can receive in accordance with his bargain.

This was first evidenced in the Coronation cases. By the overruling of *Chandler v. Webster*, the decision in *Krell v. Henry* appears to be fully confirmed.⁹ One who contracts to pay £75, for the use of a few rooms on Pall Mall for the two days of a coronation pageant, is discharged from his duty to pay if the pageant is prevented by the illness of the king. The stated explanation of this is, however, that Krell's duty to pay was subject to an "implied condition" and that the purpose of Henry as well as that of Krell was "frustrated" by the unexpected event. The defence of this explanation must be left to others than the present writer, who prefers to regard the case as a very exceptional one and to justify the decision on the ground that £75 was a temporarily inflated value caused by a widespread desire to witness an expected event and that by generally prevailing opinion the risk of its non-occurrence should be borne at least in part by the one whose purpose was to realize the inflated profit—to reap where he had not sown.¹⁰

The existence of such a "prevailing opinion" is, indeed, a matter of some doubt. There is no such opinion to support a general rule that when one party's purpose of realizing an expected gain is frustrated the law will discharge him from duty and thus frustrate the other party's purpose also. Such a rule can now safely be laid down only in cases where one party's purpose is frustrated by the other party's inability to render substantially in full the specific performance that was bargained for. This is the defence commonly called "failure of consideration."

A contractor who promises to pay a stated amount for specified goods or services consciously takes the risk of a decline in market values; not the risk of non-delivery of the goods or non-performance of the service, except when his contract is aleatory in form—a wager. He is a speculator in values, although not a gambler. Variation in the value of a promised performance, caused by the events that affect the bargaining appetites of men, are the rule rather than the exception. Bargainers know this and swallow their losses and disappointments, meantime keeping their promises.

There are exceptional cases, however, that contractors may feel not to be clearly within this general custom. The frustrating event, although foreseeable, was not in fact foreseen; and the disappointment is hard and bitter. In such cases, the phrase "frustration of contract" has an appealing sound to the loser. Cases have been increasing in the United States in which such a defence has been

⁹ *Chandler v. Webster* [1904] 1 K.B. 493; *Krell v. Henry* [1903] 2 K.B. 740. Since the *Fibrosa* decision, it seems that Henry had a right to restitution of the advance payment. However, the cases are materially different, since Fairbairn's promised performance (like Caldwell's) had become impossible, while Krell's had not.

¹⁰ It is hardly accurate to say that the frustrating event in the Coronation cases—the king's illness—was not such as "might have been anticipated and guarded against." Careful contractors very frequently guard against exactly that kind of an event by obtaining insurance against the risk. It was an event much more likely to happen than the incursion of "an hostile army."

asserted; it can not be doubted that there will be many more. The use of the phrase promotes confusion of thought. In the minds of both contractor and jurist, "frustration of purpose" shifts easily into "frustration of contract," the description of a variable fact situation turns into a statement of juristic operation. A contractor whose purposes are "frustrated" is readily convinced that his legal duty to make further payments is "frustrated" and that he has a legal right to the restitution of payments already made. The decisions already rendered encourage his lawyer to hope for success in the courts.

Cases have been very numerous in which the purposes of one who rented a building for use as a liquor saloon have been frustrated by a statute prohibiting the sale of liquor. In these cases there has been no "failure of consideration," nothing but frustration of the hope of profitable business. If the lease is so drawn as to limit the tenant to the one specific use, the more frequent decision is that his duty to pay rent is discharged.¹¹ If other uses are allowed, though less profitable, the rent must be paid as agreed.¹² If leased premises are totally destroyed by cataclysm, the tenant may hope for a decision in his favour.¹³ Wartime restrictions on the sale of automobiles and gasoline greatly reduced the value of leased premises, but did not discharge the tenant from duty to pay rent or to pay his hired salesmen.¹⁴

The frustration of a contractor's purpose may take place by a catastrophic destruction of the value of "money" as well as by a similar destruction of the value of goods or of a flat in Pali Mall. Consider the position of the widow of the Englishman who, while in St. Petersburg in 1887, took out a twenty-payment life policy in an American company represented by a German agent. In return for payment of an annual premium of 2,300 marks for twenty years, the company promised to pay 60,000 marks at death of the insured. The premiums were paid in full from 1887 to 1907, the total being the equivalent of £2,377. The insured died in 1922, after marks had become worthless through printing-press inflation. The Court of Appeal held that the widow could recover nothing, 60,000 marks having the value of less than a farthing.¹⁵ Inasmuch as the company had received and enjoyed the use of the full premiums paid in undepreciated marks or pounds,

¹¹ *Greil Bros. v. Mabson*, 179 Ala. 444, 60 So. 876 (1913).

¹² *Imbeshied v. Lerner*, 241 Mass. 199, 135 N.E. 219 (1922); *Plaza Amusement Co. v. Rothenber*, 65 Fed. 2d 254 (1933, C.C.A.), use of property as a theatre prevented by ordinance, other uses possible.

¹³ *Viterbo v. Friedlander*, 120 U.S. 707, 7 S.Ct. 962 (1887), destruction by a Mississippi flood, the court applying the civil and statutory law of Louisiana and saying that the "common law" is otherwise; *Waite v. O'Neil*, 76 Fed. 408 (1896), river front and landing destroyed by flood.

This will clearly be the decision if the contract is for the occupancy of rooms only or of an "apartment." *Moving Picture Co. v. Scottish Union and N. Ins. Co.*, 244 Pa. 358, 90 Atl. 642 (1914).

¹⁴ *Lloyd v. Murphy*, 25 Cal. 2d 48, 152 Pac. 2d 47 (1944) is a case in which the decisions are well reviewed and the opinion soundly reasoned. The court specifically distinguishes between impossibility of performance and the frustration of hopes of profitable use.

In *Megan v. Updike Grain Corp.*, 94 Fed. 2d 551 (1938, C.C.A.), the operation of a grain elevator was made unprofitable by a change in freight rates that caused wheat to be shipped elsewhere.

In *Brown v. Oshiro*, 68 Cal. App. 2d 393, 156 Pac. 2d 976 (1945), the Japanese lessee of an hotel was held not discharged from duty to pay rent by the evacuation of all Japanese from the Pacific coast. He was able to sublet at a severe loss.

¹⁵ *Anderson v. Equitable L. Assur. Soc.*, 42 T.L.R. 302 (1926). In two similar cases, the American Circuit Court of Appeals made a like decision.

But in three cases soon after the Civil War, the United States Supreme Court, in an action on a promissory note payable in Confederate currency (now worthless) required the debtor to pay the value of the Confederate dollars in United States money measured as of the date of the note. See *Effinger v. Kenney*, 115 U.S. 566 (1885). On an appeal from an American Colonial Court, in an action on a note payable in colonial bills that were worthless and withdrawn, the Privy Council gave a decree for a division of the loss. *Deering v. Parker*, 4 Dallas XXIII (1760, P.C.), opinion by Lord Mansfield.

for a period of from 15 to 35 years, "justice" would seem to require at least a restitutionary remedy. Let us hope that the company honoured the plaintive appeal of each of the three judges to its generosity.

The problems arising out of the governmental requisition of chartered ships have been dealt with in the American cases in much the same way as in the English cases. By such a requisition the owner is discharged from his duty to supply the ship for the charterer's use, the requisition having made the promised performance impossible.¹⁶ The risk of such government action is not one that the owner has agreed to bear, even in the absence of a *force majeure* clause; and it is not one that by common practice and opinion he should be required to bear.

The charterer, on the other hand, is discharged from his duty to pay the promised hire, not because his performance has become impossible, but because he is no longer receiving the bargained-for equivalent. If the charterer, at the time of requisition, has already received substantially in full the contemplated use for which he bargained, he should not be held to be discharged from duty to make remaining payments, even though they had not fallen due at the time of the requisition. The consideration for these payments has not failed; the charterer's purposes have not been frustrated.

The parties to the charter-party have not been discharged from duty because the contract has been "frustrated;" but if they have both been discharged for other sufficient reasons, to say that the contract has been "frustrated" is only perpetuating the use of a bad term to state the result.

If when a requisition is made, it appears to be temporary, making performance by the owner impossible for only a relatively short period, and not depriving the charterer of a vitally important part of the bargained-for use, the discharge of the owner extends no further than the impossibility and the discharge of the charterer no further than the failure of the consideration. There is no established rule of law that prevents a court from adjusting in reasonable fashion the amount of hire to be paid and the distribution of the governmental compensation, both parties having suffered deprivation at the government's hands; but rules determining such a reasonable adjustment seem not to have been worked out.

After the distinction between "promises implied in fact" and "promises implied in law" came to be openly recognized, the result has not been to disapprove the decisions in which the "implication" was a fiction. Instead, it has beneficially resulted in the recognition of "quasi contract" as a large and legitimate branch of Anglo-American common law. In holding that the duty of one of the parties to a bilateral contract is "impliedly conditional" on substantial performance of the bargained-for equivalent (or on tender thereof or readiness to perform it), the courts have usually let it be assumed that the "implication" is one of fact, discovered by process of true "interpretation." The same is true in the field of impossibility and frustration, the promisor's duty being said to be subject to an "implied condition" that performance should not become impossible (or "impracticable in a commercial sense") or that the promisor's purpose should not be substantially frustrated by an unanticipated event. If accurate analysis demonstrates that in very many cases the "implied condition" has involved as much fiction as did the "promise implied in law," once again the result must be expansion of the law and not recession. The attention of the court will be consciously directed to the distribution of unanticipated risks in accordance with the *mores* and practices of the time. The

¹⁶ *Texas Co. v. Hogarth Shipping Co.*, 256 U.S. 619, 41 S. Ct. 612 (1921), using "implied condition" theory; the *Isle of Mull*, 278 Fed. 131 (1921, C.C.A.), the opinion of the District Judge, below, had much to recommend it, 257 Fed. 798 (1919); the *Claveresh*, 264 Fed. 276 (1920, C.C.A.), affirming *Earn Line S.S. Co. v. Sutherland S.S. Co.*, 254 Fed. 126 (1918), where Hand, D. J., recognized the distinction between impossibility and failure of consideration.

legal duty created by a promise will thus often be held to be constructively conditional.¹⁷

When an actually unforeseen event has caused a promised performance to be impossible or has increased or decreased its cost or value, and the risks involved can not be shown by a process of factual "interpretation" to have been allocated by the parties themselves, the court must determine their allocation in accordance with the opinions of men in general, as evidenced by business practices and social *mores*.¹⁸ Such a judicial allocation is always a subdivision of risks. As nearly as may be feasible the parties are restored to the *status quo ante*. The judicial remedy is restitution, not enforcement. Duties still unperformed are extinguished; performances already received must be returned, either in specie or in value. Each one loses the benefits of his bargain; neither one is required to give something for nothing. If property has been destroyed without fault, the loss must be borne by its owner—*res perit domino*. A party may reasonably be required to pay a fair share of expenditures incurred by the other in the course of his performance, insofar as those expenditures are now a net loss. The courts of to-day—the successors of the Chancellors of yesterday—have full power to fashion their judgments and decrees as the "justice" of the time requires.¹⁹

In creating our vast system of common law, as well as in applying constitutions and statutes, the function of our courts has always been the determining of "justice;" and while in large degree this has assumed the aspect of repeating and applying the worded generalizations of our predecessors, in at least as large degree it has been the modification of those generalizations and the construction of new ones in accordance with prevailing practices and opinions—the *mores* of the time.

In this the courts of to-day are doing only that which the courts of yesterday were obliged to do. That the judicial function is difficult and that the growth of law has always involved uncertainty and conflict, a study of the history of any branch of the law will quickly demonstrate. But it should not be supposed that the function will be less well discharged by judges who are conscious of its true character, judges who being well advised of the doctrines of the past and of the service rendered by deductive logic are at the same time aware that "justice" and "the law" are in continuous living growth and are not the finished product of a dead hand.

¹⁷ The recognition that an "implied condition" is often purely "constructive," not found by any factual process of "interpretation," has made rapid progress. See Corbin, "Conditions in the Law of Contract," 28 *Yale L. Jour.* 739 (1919), Selected Readings in Contracts, 871; Restatement, Contracts ss. 250-290 (1932); Patterson, "Constructive Conditions in Contracts," 42 *Col. L. Rev.* 903 (1942). Space does not permit quotation here from the wise and charming opinion of Justice Cardozo in *Jacob v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921).

¹⁸ It is too much to hope that contractors will in general relieve the courts of their difficult problem by much greater foresight of events and by an express assumption of risks or by employing the services of a professional insurer.

¹⁹ It did not require a Frustration of Contracts Act to confer this power upon the courts. In *Chandler v. Webster*, the court made an allocation of risks and a sub-division of losses. It has not been questioned that this was within its power. The allocation was "overruled" because it was not regarded as the most desirable one, and a different allocation was decreed.

THE DEBTOR'S DISCHARGE FROM LIABILITY WHEN PERFORMANCE IS IMPOSSIBLE¹

(under the Soviet Law)

[Contributed by PROFESSOR M. M. AGARKOV, Doctor of Juridical Sciences, President of the Chair of Civil Law of the Moscow State University, Deputy Director of the Institute of Law of the Academy of Sciences of the U.S.S.R.]

1. Legislative Sources.—The civil (i.e., private) law of the U.S.S.R. has been codified, and by the Constitution of the U.S.S.R., art. 14, the new All-Union Civil Code, when it has been enacted, will cover the whole jurisdiction of the Soviet Union, but meanwhile every Union Republic still retains its own civil code, modelled upon that of the R.S.F.S.R., which took effect on January 1, 1923.

The matter now of interest to us is dealt with in ss. 118, 119, 129 of this Code, other Union-Republican codes following this model. We are fully justified, therefore, in referring hereinafter to the Civil Code of the R.S.F.S.R. exclusively. It may be useful now, to enable the reader to understand clearly the discussion which follows, to reproduce, *verbatim et literatim*, the provisions of the three sections mentioned above.

"118. The debtor, unless it is otherwise provided by the law or the terms of the contract, is liable for non-performance of the contract unless he can show that the impossibility to perform has been either created by circumstances beyond his control or caused by the creditor acting intentionally or negligently."

"119. The debtor pleading impossibility of performance is not discharged from liability (1) when the subject-matter of the obligation is unascertained, and no actual impossibility of supplying articles of the same kind is shown to exist, or (2) when the circumstances rendering performance impossible were created or at any rate not prevented, either intentionally or through negligence, by persons bound by law or as the representatives of the debtor to perform the obligation."

"129. The obligation ceases to exist, either wholly or in part, in case of an impossibility to perform for which the debtor is not liable (see s. 118)."

The arrangement of the legislative provisions of the Code definitely shows that not only contractual obligations but also those which arise from other sources are covered by ss. 118 and 119. In most cases, however, it is obligations of the former group to which these sections are applied. This accounts for the fact that the Soviet legal writers are often inclined to use the phrase "contractual liability" as synonymous with "liability arising from obligation." The author's aim being to consider the whole problem from the standpoint of obligations arising from contract only, he will use hereinafter the former of the two phrases stated above, namely, "contractual liability."

2. Fundamental Principles of the Law of Contract.—Whenever a contract is not contrary to law it binds the parties who entered into it. The *pacta sunt servanda* principle governs contractual obligations under Soviet law. The binding force of a contract can mean either of two things. First, the party under obligation guarantees that the object contemplated by the contract will be satisfied. It is not the doing of, or forbearance from, some definite act, but the responsibility for such act or forbearance which is *in obligatione* in such cases. This conception of contract gives rise to two further propositions, one of them being that the defaulting debtor may be sued and held liable for damages only: "*condemnatio pecuniata esse debet*." Moreover, the debtor's liability for non-performance is absolute, whether he was in fault or not. Secondly, there may be a

¹ The translation of this very interesting contribution by Professor Agarkov from the Russian has given considerable difficulty, but every effort has been made to give a correct representation of his views.—Ed.

different meaning of the binding force of obligation, i.e., the debtor undertakes to do or forbear from doing some act while no duty is imposed on him to guarantee the benefit or effect of the contract; which means that it is the act or forbearance which is *in obligatione*. In that case we arrive at conclusions different from that formulated above. First of all, specific performance may be claimed. Secondly, the debtor is liable to damages only in case the performance was originally possible and the prevention of the impossibility was within the debtor's control.

Of the two conceptions stated above, neither is applied rigidly and consistently, each of them being a general rule from which there may be exceptions. Of these two conceptions it is the latter which is most characteristic of the modern law of contract; and it is this conception which is adopted by Soviet civil law. Accordingly, as a general rule, Soviet law insists upon contractual obligations being specifically performed, the debtor being liable for damages only when performance was originally possible, and it was within the debtor's power to prevent the impossibility. Such impossibility discharges the debtor from liability and terminates the obligation. (Civil Code ss. 118 and 129.)

3. Impossibility of Performance.—Impossibility of performance as defined in ss. 118 and 129 of the Civil Code involves the consequence that there can be no effective claim for specific performance. The case may be such for one of the following three reasons:

(1) The performance has become impossible in fact. The debtor, to give an example, was bound to supply some specific article to the creditor; the article has perished. Or a painter who undertook to paint the portrait of a client, has gone blind. In such and similar cases only is there impossibility of performance in the proper sense of the word. When the phrase is used in any other sense it necessarily becomes a technical expression of wider meaning than when it is used literally and physically.

(2) The performance has become impossible in law. Such is the case whenever the performance of an act contemplated by the contract is afterwards forbidden by law or by an order of some duly authorized body. The performance is legally impossible whenever the subject-matter of the contract becomes unlawful.

(3) It would be contrary to morality, in the particular circumstances of the case, to insist upon the contract being completely performed. The debtor, for instance, being personally bound to perform some act under the contract, is overtaken by some illness rendering the performance exceedingly painful though not physically impossible. To enforce performance in such a case would be contrary to the rules of socialist human intercourse which it is the duty of every citizen of the U.S.S.R. to respect. (Art. 130 of the Constitution of the U.S.S.R.)

In its treatment of the problem of contractual liability the Soviet law attaches no importance to the difference which exists between so-called initial impossibility, i.e., one existing at the time the contract was made, and supervening impossibility. A contract may be annulled on the ground of initial impossibility; for instance, a contract induced by misrepresentation or fraud as to the possibility of performance may be held voidable.² (S. 32 of the Civil Code.) If both the parties were aware of the impossibility the contract may be held invalid as fictitious, i.e., one not intended to be of any legal consequence. (S. 34 of the Civil Code.) Finally, if the impossibility consists of legal impossibility the courts will hold the contract void² by reason of its subject-matter being unlawful. But when the contract is not held invalid on the ground of initial impossibility, the precise moment at which the impossibility arises is of no importance, and it is only impossibility existing at the time when the performance becomes due that matters.

Thus, Soviet law rejects the *impossibilium nulla obligatio* rule (applied by

² The distinction between "void" and "voidable" exists in the Russian text of this article.—Ed.

Roman lawyers to stipulation), to which some modern legal systems (the German Civil Code among them) attach general importance.

Soviet law denies any legal operation to so-called economic impossibility of performance, i.e., the fact that performance would be extremely disadvantageous or even ruinous to the debtor. As a general rule, the fact of the debtor lacking or being inadequately supplied with the property necessary to perform his duty does not discharge him from liability. This rule is stated in the Civil Code, s. 119, sub-section 1, by which the debtor remains liable for non-performance in case the subject-matter is unascertained and no actual impossibility to furnish an article of the same kind is shown to exist. The rule stated in sub-section 1 of s. 119 is given therein a somewhat old-fashioned expression, being a paraphrase of the old *genus perire non censetur* formula. Its true meaning is that it is immaterial that the debtor lacks the necessary means of performance, nor does it matter how much it would cost him to acquire the articles in question. In such cases the law, while not discharging the debtor from his obligation, nevertheless protects him by authorizing the courts to postpone performance or allow it to be carried out by instalments as the case may be. (S. 123 of the Civil Code.) Further, any part of the debtor's property which can be regarded as the bare necessities of life cannot be legally taken from him to compensate for his non-performance. The labour legislation allows only a defined portion of the debtor's wages to be claimed in an action as compensation.

Economic changes not contemplated by the parties at the time when the contract was made do not affect their rights and duties under the contract. In other words the so-called "things standing as they are" clause (*clausula rebus sic stantibus*) cannot be pleaded as a defence in Soviet courts. The *clausula rebus sic stantibus* rule is recognized by the Civil Code only in very special cases, for instance, in the case of an executory contract for the loan of a chattel (*pactum de mutuo dando*: s. 219 of the Civil Code). But such cases, if any, are very rare in the Soviet economy and everyday life, the consistent application of the *pacta sunt servanda* principle being the general rule. The debtor is not allowed in order to avoid or reduce his liability to plead new circumstances which either could not be or were not foreseen by the parties at the time the contract was made.

4. The Debtor's Fault.—The debtor, to escape liability, must plead and prove that the impossibility was due to some circumstance beyond his control. If such was not the case, and the debtor could have prevented the circumstance in question he failed to do so either intentionally or through negligence; in other words, he was in fault. Thus the ground of liability is implied fault on the part of the debtor, the presumption being a rebuttable one (*praesumptio juris*) and the onus of proof lying on the debtor. In other words, the debtor is not suable for *casus*, i.e., impossibility of performance which arose through no fault of his own.

The wording of s. 118 as to circumstances beyond the debtor's control does not mean irresistible power (*vis major, force majeure*). To discharge the debtor from liability the impossibility need not necessarily be due to irresistible power; mere *casus* will suffice.

Impossibility caused by the creditor's intentional act or negligence discharges the debtor from liability, as the debtor's fault cannot be presumed in such a case.

The second sub-section of s. 119 of the Civil Code is of great importance within the scope of the present article. By this sub-section the debtor is responsible for the default of a person on whom the responsibility for performance of contract is imposed either by the law or because he is the representative of the debtor. The default of such a person is treated as equivalent to that of the debtor, as explained below. The debtor, to avoid liability, must prove the absence of any fault not only on his own part but also on the part of such a

person. This also means that default by such a person is not pleadable in excuse for the debtor's non-performance of contract. The debtor's responsibility for a person on which responsibility for performance is imposed by the law or because he is the representative of the debtor, does not make it necessary for the creditor to prove fault in the debtor, either in his choice of such persons or in his control of their conduct; neither *culpa in eligendo* nor *culpa in custodiendo* need be shown.

The persons to whom sub-section 2 of s. 119 applies are as follows: (1) the debtor's employees, whether manual or not; (2) members of industrial co-operative organizations when acting in their capacity as members, the organization being the debtor; (3) the persons engaged by the debtor to perform, either wholly or in part the contractual obligation undertaken by him; (4) the debtor's representatives acting under his authority or by operation of law (particularly guardians).

Among the persons to whom the above sub-section refers, it is unnecessary to mention those acting in the capacity of a corporation's governors or controllers because their acts when within the limits of their authority, i.e., not *ultra vires*, are the acts of the corporation; the default of a corporation's governors or controllers is that of the corporation itself.

Such are the general provisions of Soviet law regulating the liability of the debtor. Some exceptions exist. The debtor's responsibility is, by special legislation, increased for some purposes, for instance, by the law relating to public carriers. Moreover, the seller's liability for the quality of and title to an article sold does not necessarily require any fault on his part.

5. Agreements to Increase, or Reduce, the Liability of the Debtor.—Undoubtedly the debtor's liability may be increased, to the prejudice of the rules stated above, by the express terms of an agreement with his creditor to that effect. The liability undertaken by the debtor may be possibly such as to render the contract a guarantee that some definite benefit is secured to the creditor. As to a mitigation of the debtor's liability, Soviet law does not prevent the debtor from agreeing with his creditor to the effect that he (the debtor) should not be liable for slight negligence on the part either of himself or of those persons to whom he has delegated the duty of performance. No agreement to free the debtor from liability for the intentional or grossly negligent conduct of himself or of those persons can be held valid. There is a special reservation which forbids socialist organizations, whether co-operative or belonging to the State or of other kinds, to enter into agreements with one another which reduce the debtor's liability to the prejudice of the rules established by law to that effect.

6. Contractual Liability and the War.—War, which usually brings about radical alterations in the economic situation, puts the law of contract to a severe test. The old *clausula rebus sic stantibus* problem arose during the first World War and again became a problem during the second World War. But the position adopted by Soviet law in regard to this problem is peculiar to itself. Soviet law is the law of a Socialist State. The economic foundation of the U.S.S.R. is the socialist system of economy and the socialist ownership of the implements and means of production. The economic life of the U.S.S.R. is determined and directed by the State plan of national economy. The economic situation in which contracts are made and performed is different from that existing in capitalist countries. Accordingly the practice of the Soviet courts presents a different picture from that which is found in those countries.

In the sphere of contractual liability only one point arising from the war situation was in question; it was, whether a debtor's general reliance upon the circumstances or hardships of the war situation could be allowed to reduce his liability. The point at issue was made clear in a decision pronounced by the

Civil Board of the Supreme Court of the U.S.S.R. upon an action brought by the Shalsk Fishery Works against the "Pryboi" artel.

"The Court cannot accept all the pleas of the defendants (the decision reads) and must differentiate between them. Difficulties created by the war which are usual and natural, such as the calling up of the members of the artel to serve in the Army, cannot be considered as sufficient to discharge the defendants from their duty to perform the obligation undertaken. Only those averments of the defendants are pleadable in excuse of their non-performance of the contract, which refer to essential circumstances immediately and directly arising out of conditions created by the war, e.g., the hostilities in the fishing area, the destruction of fishery gear, etc." ("The Practice of the Supreme Court of the U.S.S.R." for 1942, No. 2, pp. 33-34.)

In this case s. 118 of the Civil Code was applied according to its strict sense. The Board held that war conditions can operate to discharge a contractor from performance only when performance is absolutely impossible, as, for instance, would occur if the fishing area had become involved in hostilities.

The recent war has caused no alteration in the provisions governing contractual liability under Soviet law. The problem of changed circumstances in the U.S.S.R. was not, and could not be of such importance as this problem involved in capitalist countries. The Soviet Socialist economy stood the hard test of war and dispensed with those correctives which became so widespread elsewhere throughout the world.

FRUSTRATION OF CONTRACT IN URUGUAYAN LAW

[By DR. EDUARDO J. COUTURE, *Professeur de Procédure civile à la Faculté de Droit et de Sciences Sociales de Montevideo.*]

I.

1. Pour simplifier notre exposé, nous adopterons la même dénomination que les Anglais donnent au phénomène juridique appelé *Frustration of Contracts*. Bien que ces termes soient inconnus dans la terminologie juridique de langue espagnole, leur sens en est suffisamment clair: "frustration" veut dire privation de ce qu'on attend, ou même inexistence des effets qu'on a cherché à obtenir. Dans la terminologie juridique, le concept de "frustration" se trouve dans le droit pénal uruguayen à propos du délit manqué.

Le droit civil comme le droit commercial considèrent à plusieurs reprises l'impossibilité d'exécution du lien obligataire sous le titre de "frustration." De cette manière et abstraction faite de la différence de sens entre les termes anglais et les termes espagnols, on peut généralement affirmer qu'il n'y a pas de danger scientifique à traduire littéralement les mots "frustration du contrat" pour désigner l'inexécution par impossibilité naturelle.

2. Il convient de préciser tout d'abord que le droit privé de l'Uruguay est contenu dans des codes analogues à ceux de la France, et de l'Espagne. Le code civil date de 1868 et est en vigueur depuis le 1er janvier 1869. Ses tendances correspondent dans leurs lignes générales à celles du Code Napoléon, mais beaucoup de ses solutions s'éloignent du texte de 1804 pour préférer les leçons des grands commentateurs français du XIXe siècle, à côté des solutions empruntées au droit espagnol, au Code civil chilien, au projet argentin de Vellez Sarsfield, au projet uruguayen d'Acevedo, au projet brésilien de Freitas.

Dans le chapitre réservé aux obligations, on trouvera en bonne position le problème de la frustration des contrats. Les sources principales se trouvent à ce sujet dans ces derniers projets et codes, plutôt que dans le Code Napoléon. De toute manière on peut établir une étroite analogie entre ces solutions et les principes du droit romain, ce qui montre que ces derniers ont joué un grand rôle dans l'élaboration du droit civil de l'Uruguay.

II.

3. Il y a une différence radicale entre le droit anglais et celui qui a été consacré par notre Code. Dans celui-là, les obstacles d'ordre matériel de n'importe quelle nature ne libèrent pas le débiteur de l'exécution de son obligation, tandis que d'après la loi uruguayenne de tels obstacles constituent un moyen naturel de libération du débiteur. La *Common Law* a dû construire le système de la frustration du contrat avec des éléments relativement récents. Le système adopté dans l'affaire *Fibrosa de 1943* et celles qui l'avaient précédée, *Bank Line*, *Metropolitan Water Board*, et *Tamplin*, se rapprochent des solutions que les droits inspirés du droit romain avaient adoptées depuis quelques siècles.

Une simple lecture de quelques articles du Code civil de l'Uruguay suffit à comprendre comment des difficultés insurmontables peuvent aboutir à libérer le débiteur de l'exécution de ses obligations.

L'art. 1549, par exemple, dispose, à propos de l'impossibilité de payer, que l'obligation de donner ou de faire s'éteint sans dommages-intérêts quand la prestation devient physiquement ou juridiquement impossible. La même solution est adoptée par le Code de commerce (art. 1009).

Ces deux dispositions constituent sans aucun doute un moyen de libération beaucoup plus large que les concepts de force majeure ou de cas fortuit, puisqu'elles couvrent tous les cas d'impossibilité matérielle d'exécution, indépendante de la volonté du débiteur.

Un autre texte de caractère général (article 129 du Code civil et article 209 du Code de Commerce) prévoit que tous les contrats doivent être exécutés de bonne foi et que, pour cette raison, les contractants sont responsables des conséquences qui dérivent de cette obligation, selon la nature du contrat et selon l'équité.

Ces principes sont si clairs que la jurisprudence n'a pas à s'occuper de telles situations. Les cas d'application sont donc assez rares, et même pendant la guerre où plusieurs cas de frustration de contrat ont pu être constatées, les tribunaux n'ont pas eu à connaître de demandes de ce genre.

III.

4. Les solutions examinées ci-dessus font partie d'un système général d'obligations, qui constitue l'un des chapitres les plus heureux de notre Droit, compte tenu de l'époque à laquelle il a été élaboré.

Dans ce cadre, la maxime *pacta sunt servanda* conserve toute sa force étant donné que le contrat, en vertu de l'article 1291 du Code civil donne naissance à une règle à laquelle les parties doivent obéissance comme à la loi elle-même.

Le principe fondamental est, par conséquent, celui que les contrats doivent être accomplis dans les termes convenus.

Toutefois on peut dire ici, comme dans le droit français, qu'il y a un système tendant à atténuer la rigueur des contrats par des considérations de bonne foi. Les idées de juristes français comme Ripert et Gorphe ont toujours provoqué un écho favorable dans les milieux juridiques de l'Uruguay.

L'atténuation de la maxime *pacta sunt servanda* pour tenir compte de la bonne foi du débiteur et par équité a permis d'adoucir la règle principale.

On peut classer par exemple ces atténuations de la manière suivante :

(a) Les faits impossibles font disparaître l'objet du contrat en le laissant sans effet (article 1283 du Code civil);

(b) L'erreur de fait entraîne l'annulation du contrat dans les limites fixées de la loi (article 1271 du Code civil);

(c) aucun contrat ne peut être résilié par la volonté d'une seule des parties (article 1293 du Code civil),

(d) aucun contrat ne peut être exécuté qui soit contraire à l'ordre public national (article 1293 du Code civil);

(e) en case de doute concernant l'exécution d'une obligation l'interprétation

doit être faite en faveur du débiteur (article 1304 du Code civil) (*in dubio pro debitore*);

(f) l'exécution d'une obligation comporte de manière implicite la condition que le cas fortuit exclura toute responsabilité (article 1322 du Code civil);

(g) la même remarque s'applique au cas de force majeure qui comprend les actes des pouvoirs publics, la guerre, les grèves etc. Un décret du Gouvernement vient de prévoir que les augmentations de salaire imposées à ses contractants par les organes officiels seront à la charge de l'Etat.

IV.

5. En résumant ce qui précède et à titre de conclusion on peut constater qu'en dépit de la règle selon laquelle les contrats civils et commerciaux sont obligatoires, de nombreuses atténuations ont été introduites.

L'exception prend même un caractère général puisque la loi précise que les contrats doivent être exécutés en tenant compte de l'équité. Il faut en outre rappeler que, dans notre système, n'existe pas la différence reconnue par le droit anglais entre *law* et *equity*. Le texte de l'article 1291 du Code civil qui parle de l'équité constitue un des très rares cas où l'équité intervient nettement dans le système de la loi. Par ailleurs, et en dehors de ce texte général, il y a beaucoup d'autres principes déjà mentionnés dans les chapitres antérieurs, qui tempèrent la rigueur des conventions.

En conclusion, une ' frustration ' de contrat provoquée par des faits de guerre que les Parties n'ont pas le pouvoir d'empêcher serait toujours interprétée par les Cours de l'Uruguay comme une hypothèse pouvant justifier la libération du débiteur.

FRUSTRATION OF CONTRACT IN LATIN AMERICA AND PARTICULARLY IN BRAZIL

[By HIS EXCELLENCY JUDGE J. P. AZEVEDO, *Judge of the International Court of Justice.*]

Le Code civil brésilien de 1916 considère comme synonyme la notion de force majeure et de cas fortuit, en exigeant non seulement l'imprévisibilité, mais également l'inévitabilité, pour que le débiteur soit dégagé de son obligation. En outre, le Code précise que l'impossibilité relative d'exécuter la prestation ne permet pas au débiteur de se dégager de son obligation.

Cependant, plusieurs voix se sont élevées en vue d'atténuer la rigueur de la règle primordiale *pacta sunt servanda*, toutes les fois que l'exécution du contrat se heurte à une difficulté considérable et extraordinaire. On rencontre d'ailleurs partout des personnes désireuses de restaurer l'ancienne clause du droit canonique *rebus sic stantibus*, sous la désignation moderne de la théorie de l'imprévision.

En effet, la première grande guerre a amené des modifications profondes et imprévues dans le régime économique. Cela n'a pas manqué d'accélérer cette tendance dans le triple domaine doctrinal, législatif et judiciaire.

Un vrai bilan des forces en présence s'est établi en 1937, à la " Semaine internationale de Droit," qui a eu lieu à Paris. La volumineuse documentation résultant de ces travaux fournit un matériel aussi considérable que précieux pour la mise au point du problème de la revision des contrats. Cette mise au point n'est d'ailleurs pas limitée au domaine du droit privé, mais elle s'étend jusqu'au droit international. Cependant, l'intérêt principal se porte sur le droit administratif notamment à propos des concessions des services publics. On en vient à reconnaître l'admissibilité d'une revision périodique et continue des clauses du contrat. Sur la base des rapports et des discussions de 1937, on pourrait établir une ligne de démarcation très nette entre les pays qui montrent des ten-

dances favorables à la revision et ceux qui maintiennent une attitude contraire à la modification des vieux principes. Peut-être convient-il—selon les conclusions présentées alors par le Prof. Gutteridge—de placer dans une troisième classe l'Angleterre attachée à la notion plus rigide de la force majeure (Act of God) plus propre aux contrats de droit maritime.

En réalité, il n'y a pas eu une différence profonde entre les deux groupes, parce que tous les juristes présents à la Conférence ont souligné, d'une manière générale, l'avantage qu'il y aurait à concilier les deux principes en leur donnant une ampleur plus ou moins grande. On peut même dire qu'ils ont trouvé devant eux une nouvelle phase de l'évolution cyclique qui avait déjà auparavant mis la règle canonique en opposition avec la notion classique du droit romain. On peut rappeler ici que Grotius déjà avait critiqué cette règle.

En ce qui concerne l'activité du législateur, on a admis la possibilité de nouvelles règles touchant l'exécution des contrats en cours. Mais de nombreuses réserves ont été exprimées à propos de l'intervention des juges, qu'elle ait un caractère général ou sporadique. Les conclusions du Prof. Georges Ripert, qui a dirigé la discussion de 1937, sont allées dans cette direction: le grand civiliste français ne s'est même pas excusé d'établir une comparaison entre l'action paisible des juges suisses et celle de la magistrature française plus encline à prendre une direction trop avancée. Ce mouvement tendant à rajeunir des idées médiévales, a provoqué de remarquables efforts dans la doctrine. Certains considèrent ces idées comme plus anciennes encore, en situant la source dans certaines paroles de Cicéron ou dans un texte de Neratius (cela en dépit du caractère sacré qui avaient les contrats aux yeux des Romains). On discute la question de savoir si le motif du changement doit être lié à la manifestation de volonté en elle-même, ou si ce motif est déterminé par des événements extérieurs. On discute aussi sur le point de savoir si ce motif naît avec le contrat, comme dans la célèbre formule de Windscheid (présupposition), ou s'il apparaît plus tard, pendant l'exécution du contrat. De toute manière, on ne doit pas attribuer à une seule cause le progrès de cette tendance, due au jeu simultané de plusieurs idées-force qui se dirigent vers le même but.

C'est pourquoi il était bien naturel qu'en Amérique latine le même mouvement se produisit lors du déclenchement de la première guerre mondiale.

Tel fut le cas particulièrement au Brésil. Les milieux juridiques se sont agités à ce sujet et la première double question qui se soit posée a été d'étudier la revision des contrats de *lege lata* et de *lege ferenda*. Certains auteurs ont affirmé que de tels principes étaient légitimes dans des circonstances extraordinaires et en vertu même des textes du code civil qui permettent certaines modifications des contrats, même à l'insu d'une des parties. On peut citer comme exemple l'avancement de la date d'échéance d'une prestation, la demande tendant à renforcer des garanties, la résiliation exceptionnelle en raison d'un changement de la situation financière, le refus de remettre la chose vendue (stoppage in transitu), la limitation des indemnités selon la prévisibilité normale, etc.

D'autres ont défendu le point de vue opposé, en pensant que ces textes sont communs à tous les codes civils et ne permettent pas une généralisation aussi grande de la clause *rebus sic stantibus*, notamment en France et en Italie. D'ailleurs, la loi brésilienne, précisément dans le cas du contrat d'entreprise, interdit toute augmentation de prix, même en raison de la hausse des matériaux ou de la main-d'oeuvre.

Cependant, tous les écrivains ont demandé l'adoption formelle du nouveau principe, non seulement dans les cas d'impossibilité absolue (absence de faute, fait du prince, disparition de l'objet etc.) qui sont déjà prévus dans le système d'inexécution contractuelle et de reconnaissance de la force majeure d'après la notion habituelle de celle-ci, dans les droits continentaux européens, mais aussi dans le cas d'une impossibilité relative qui pourrait entraîner la ruine du débiteur

s'il se décidait à exécuter le contrat, grâce à des efforts exceptionnels en faveur du créancier qui serait ainsi injustement favorisé.

En dehors des mesures adoptées par le législateur en raison de certaines situations, on a dû aussi reconnaître au juge la faculté d'intervenir dans des circonstances extraordinaires, contraires à une élémentaire équité, et afin d'éviter que puisse triompher l'abus d'une inégalité économique, ni prévue ni prévisible, due plutôt à des causes étrangères.

Les divergences d'opinion se sont manifestées seulement au sujet de l'étendue du pouvoir à donner aux juges soit pour suspendre le contrat, soit pour le modifier; soit pour modifier seulement l'échéance ou le prix, soit pour adopter d'autres modifications aussi.

Deux thèses ont été publiées en 1932, par Arnaldo Medeiros de Fonseca et Arthur Rocha, et ont exercé une grande influence sur le mouvement juridique national. Tout d'abord, s'est renforcé le courant favorable à une revision modérée des contrats toutes les fois que l'équilibre normal des prestations aurait été gravement rompu, sans qu'il y ait eu faute et par le jeu d'une action imprévue. Beaucoup de livres et d'articles ont été publiés à ce sujet dès cette époque. Plusieurs mesures ont été prises dans le domaine législatif. Par exemple, l'adoption interne de la clause dite diplomatique dans les contrats de location de maisons. Un preneur peut ainsi se départir du contrat, s'il est fonctionnaire et est transféré à un autre endroit, ou qu'il a subi une appréciable diminution de son traitement. Ensuite, on a interdit la clause d'or, avec effect rétroactif. On a introduit la notion de responsabilité de l'Etat pour révocation du personnel lorsqu'un établissement de commerce est fermé en raison d'un acte d'ordre public.

D'autres lois, promulguées dans le même sens, se ramènent toujours à la fameuse loi Faillot de 1916, laquelle a précisé le mouvement qui avait déjà eu lieu en France à la suite des arrêts successifs du conseil d'Etat et dont le premier avait été rendu à propos de l'affaire du Gaz de Bordeaux.

Ainsi, en 1941, le Comité de revision du Code civil brésilien a pu consacrer ce principe dans projet d'un code d'obligations civiles et commerciales:

Art. 322. " Si, en raison d'événements exceptionnels et non prévus au moment de la conclusion du contrat, une difficulté extrême s'oppose à son exécution intégrale ou qu'il en résulte un dommage excessif pour l'une des parties, le juge peut, à la demande de celle-ci et en examinant la situation des contractants selon l'équité, modifier l'exécution de l'obligation en en prorogeant l'échéance ou en réduisant le prix."

On pourrait alléger les conséquences de la faute contractuelle en adoptant le principe qui accorde au juge le pouvoir de reviser les contrats dans des cas exceptionnels et en agissant avec beaucoup de prudence. On a pensé ainsi s'adapter à la nouvelle orientation du droit moderne. Mais en réalité ce n'était qu'un rajeunissement d'une ancienne clause considérée comme implicite dans tous les contrats dont l'exécution subissait un retard.

Il y a même un précédent à citer: celui du code polonais des obligations (article 269) qui prévoit une exception à la règle selon laquelle les contrats forment la loi obligatoire des parties. Plus tard (1942) le nouveau code civil italien a consacré certains articles (1664 et suivants), limités au contrat d'entreprise, pour éviter de véritables suicides économiques, lorsque l'exécution de tels contrats aurait eu des conséquences excessivement onéreuses pour l'une des parties.

Un Congrès juridique s'est réuni à Rio de Janeiro à l'époque du centenaire de l'Institut des avocats brésiliens (1943) et il a recommandé l'approbation définitive du projet de loi ci-dessus. Cependant, le Parlement n'a pas encore traité la question de la revision du code civil.

Le sort du problème devant les tribunaux a été semblable: on a d'abord débouté des plaideurs qui voulaient obtenir le droit de ne pas exécuter une promesse de vente d'immeuble à longue échéance. Pourtant, en 1933, une décision du juge E. Sodré a admis la résiliation d'un contrat de vente et de

représentation d'articles étrangers, en raison des graves conséquences économiques provoquées par des événements de caractère politique. La Cour d'appel de Rio de Janeiro et la Cour Suprême du pays ont confirmé ce jugement et consacré ainsi la parfaite compatibilité de la théorie de l'imprévision avec les principes généraux du droit brésilien.

On peut d'ailleurs constater qu'en réalité ce n'est pas la guerre de 1914-1918 qui est directement responsable du développement de cette nouvelle doctrine en Amérique. C'est certainement la crise économique qui a sévi en 1929-1930. Un autre grave événement est celui qui s'est produit en 1941-1942, au moment où les Etats-Unis puis le Brésil sont entrés dans la deuxième guerre mondiale. De manière inattendue, les conditions économiques sont devenues si graves que la hausse du coût de la vie a dépassé toute prévision. Parfois les matières premières elles-mêmes ont disparu du marché.

Les entrepreneurs ont été les plus importantes victimes de cette situation; ils auraient été entièrement ruinés en exécutant des constructions qu'ils s'étaient engagés à faire si leur demande en revision des prix convenus d'avance avec honnêteté n'avait pas rencontré un certain écho dans les tribunaux.

Mais précisément à propos des contrats d'entreprise, au sujet desquels la loi, comme nous l'avons déjà vu, a interdit toute augmentation—au contraire de la nouvelle législation italienne—les cours d'appel sont obligées d'admettre la distinction entre l'aléa normal, inhérent à tout contrat et fonction de la fluctuation des prix, et l'aléa anormal (Hauriou) dépassant la marge normale de prévision. Par exemple, un entrepreneur honnête ne saurait demander le double ou le triple du coût prévu d'une construction en vue de se garantir contre la lointaine possibilité d'une hausse extraordinaire des prix; en effet, un tel risque dépasse toutes les probabilités et détruit la stabilité économique qui forme la base sociale des contrats.

Les juges ont donc dû accepter une réadaptation des clauses contractuelles, à l'exception des contrats typiquement aléatoires, comme dans le classique exemple de la vente du poisson entraîné dans le filet du pêcheur.

On a dû se rappeler également la règle qui exige qu'un contrat soit exécuté de bonne foi. Elle a même joué comme seule base permettant au droit allemand d'adopter la théorie de l'imprévision, selon le témoignage de Volkman, à la Semaine internationale du Droit.

L'Etat brésilien, lui aussi, a été obligé d'admettre la même solution pour des ouvrages commandés avant le déclenchement subit de la crise économique. Ainsi, la tendance du droit brésilien rejoint celle qu'ont prise les systèmes des autres pays influencés par le droit romain, comme cela est exposé, par exemple, dans les Archives de Philosophie du Droit et de Sociologie Juridique (Paris, 1940). En France, on a également adopté la formule de fixer les prix d'un contrat selon une échelle mobile qui suit le mouvement du coût de la vie. Mais la même solution a été interdite en ce qui concerne la monnaie, pour des raisons d'ordre public.

Même aux Etats-Unis d'Amérique, la nouvelle tendance s'est manifestée et a pris le nom de *Supervening impossibility*. Cette notion a été élargie jusqu'au point d'englober les cas de "*Impracticability because of extreme unreasonable difficulty, expense, injury or loss involved.*" C'est ce que l'on trouve dans les règles recueillies par le *Restatement of the law of contracts*, organisé par l'*American Law Institute*. Récemment, le journal de l'*American Bar Association* a souligné l'influence des mesures de guerre sur l'existence des contrats, comme le *price ceiling*, l'*enforcement of priority*. Une décision de la Cour du Texas a admis la résiliation unilatérale d'un contrat de location d'immeuble, ayant pour objet un commerce d'automobiles, après la disparition d'un tel commerce. Et cependant, la notion de *lease* dépasse en Amérique celle de simple obligation contractuelle pour en arriver jusqu'aux droits réels.

En Angleterre, il ne semble pas qu'on soit allé si loin. On a élargi la notion

de cas de force majeure (*Act of God*) qui est devenue ainsi semblable à celle de l'ancien droit continental, aujourd'hui dépassée d'ailleurs, par l'utilisation généralisée de la clause *rebus sic stantibus* dans des cas exceptionnels. Cette utilisation n'a cependant pas affaibli la force et le prestige habituel des contrats.

Dans les autres pays de l'Amérique latine, s'est manifesté un mouvement semblable tendant à atténuer la rigueur de l'obligation lorsque se produisent, de manière imprévue et sans qu'il y ait faute, de graves perturbations économiques. On a voulu ainsi éviter que le contrat ne se transforme en enrichissement sans cause, pouvant conduire à une véritable extorsion et même à l'asphyxie financière de l'autre partie. On doit donc donner au juge la faculté d'intervenir dans chaque cas. Cette fonction médiatrice doit être exercée avec prudence, comme cela a été expérimenté avec succès en Suisse. Au Chili, par exemple, en dépit des réserves formulées par un grand professeur, Alessandri Rodriguez, on a généralement accepté le nouveau courant, côté des lois qui, par exemple, ont déterminé une réduction du prix des loyers. En Argentine également la lacune des traités classiques du droit civil, muets sur ce point, a été comblée par des travaux de réelle valeur doctrinale. Cependant le projet de revision du code civil n'a pas consacré cette évolution, mais Bibiloni qui en a préparé la première rédaction, a rappelé l'évolution allemande au sujet de la proposition qu'il a faite d'introduire dans le code la règle de la bonne foi dans l'exécution des contrats. En 1937, Oswald Cardini a écrit un livre sur la théorie de l'imprévision et, en dépit de la critique de J. A. Moyano, au Congrès de Droit Civil, réuni à Cordoba en 1938, un Comité spécial s'est prononcé en faveur de l'adoption du risque imprévisible, de manière à équilibrer les facteurs économiques des contrats.

THE PROJECTED CODIFICATION OF HINDU LAW

[Contributed by PROFESSOR S. VESEY-FITZGERALD, LL.D.]

[Foreword.—The following article is a public lecture delivered at University College, London, in February, 1946; publication has been delayed for a number of reasons. Meanwhile events in India have moved rapidly. In spite of widespread lawlessness and tragedy the constitutional outlook is brighter than it was eighteen months ago. Statesmanship is more in evidence. In the field of Hindu Law two Acts were passed by the reformers in 1946 dealing with points included in the draft code by which they will ultimately be superseded,¹ and in 1947 a Bill embodying the Code has actually been introduced into the Legislature. This lapsed at the close of the Session and must await re-introduction under the new constitution.

As finality has not yet been reached, it has been felt desirable to leave the article substantially as originally written, and to insert only such notes as subsequent developments render necessary. The history of the last eighteen months has an interest of its own which this method will help to bring out.]

1. The Code and Present Politics.—Proposals for a far-reaching reform and codification of Hindu Law have now been before the Hindu public for some time, and have attracted such attention as can be spared from the more urgent and exciting tasks of constitution-making and the balance of power in India. The future of these proposals is dark; can the ideal of a single reformed system of Hindu Law for all India survive, if the result of the present crisis should be to break up the unity of India and dissolve it into (at best) a loose federation of states with a centre responsible for the barest minimum of common interests? Personal law will hardly find a place in such a minimum. What chance can there be of persuading a dozen or more popularly elected legislatures to enact an identical or even approximately identical code?

¹ Both of these improved the position of women. See addendum to paragraph 6 below.

[*July, 1947.*—Regrettable though the inevitable separation of Pakistan from India is, it has one advantage, namely, that what remains of India is a more homogeneous body, capable of having a more powerful central legislature than seemed possible when this paragraph was written: the chances for the enactment of the Hindu Code are therefore distinctly improved; *see below, addendum to paragraph 11.* Moreover if such a code is enacted by the central legislature for India, its adoption by a similar central legislature for Pakistan (anxious, as it probably will be, to conciliate its Hindu minority) is obviously a less unlikely event than the agreement of provincial legislatures referred to above. Moreover even if the Pakistan Legislature should not keep in step with that of India in this purely Hindu matter, the Courts would almost be bound by the doctrines of domicile and religious personal law to apply the code to large bodies of Hindus in Pakistan, just as the Zanzibar Courts have treated the Hindu Wills Act (even though its application in India was purely local) as part of the religious law of Hindus in Zanzibar.]

2. Magnitude of the Task.—Moreover, even under conditions more favourable than exist at the present day, legislative changes of such magnitude must take time: "Delhi was not built in a day." The Indian Penal Code, from the date of Macaulay's first draft to its final enactment, took nearly a quarter of a century to become law: and the present proposals are more controversial and far-reaching in their nature than the Indian Penal Code. Statesmanlike in their main outline though they appear to be, they vary very much in the amount of attention which it has so far been possible to give to details. In some cases a bold proposal is put forward, leaving details to be filled in later; in others the details also are sketched out with admirable clearness.

[*July, 1947.*—The Code as introduced into the legislature has many improvements in drafting, notably in s. 2 dealing with the application of the Code. Such rulings as *Fanindra Deb Raikat v. Rajeshwar* (1885 XII I.A. 72) and the truly lamentable *Vithoba v. Lal Singh* (1923 19 Nag. L.R. 104) will no longer be possible.]

3. An Historical Landmark.—Nevertheless, the proposals even in their present form merit the attention of students of comparative legislation not only for their intrinsic interest, but also, as a stage in the long history of Hindu law and for the causes which have given them birth. Those causes, which we propose briefly to consider before the proposals themselves, may perhaps be classified as legal, educational and economic, and it will be convenient to consider them in that order; for, though the economic causes are, no doubt, the most important, they could hardly operate if the ground had not been prepared by the others.

4. (a) Legal Causes.—There is almost universal dissatisfaction with the present state of Hindu Law. It is rigid without being certain. Judicial precedent, which in the early days of British rule was welcomed as giving the law a previously unknown publicity and an almost forgotten uniformity, is no longer a unifying influence. The multiplication of mutually independent High Courts and the enormous flood of law reports have made it a source of confusion and uncertainty. The case law has become a luxuriant jungle where it is impossible to see the wood for the trees. The evil is far greater than it is in England—or probably even in the United States; and is lamented by everybody, even by the editors of law reports whose industry does so much to aggravate it. There have already been unofficial attempts to state the law in the form of a Code with commentaries: the works of Sir Dinsha Mulla and Sir Hari Sing Gour are justly famous. But those works, being intended for the practitioner, are confined to elucidating so far as possible, even if not disentangling, the present law. They cannot meet the need for reform. Moreover, there are parts of the present law where even the most learned text-writers disagree fundamentally, and no man can state the law with any degree of confidence—the law of inheritance by cognates (*bandhus*) being the most obvious example. Again, there have been decisions, even of the

Privy Council, which are widely felt to be out of accord both with ancient authorities and the modern spirit.

5. (b) Educational Causes.—It would clearly be an impertinence for a non-Hindu to attempt to estimate how far the spread of western education has divorced the modern Hindu from the ancient practices and rules of his religion, especially as it is probable that the majority even of those who no longer observe those practices still retain a strong nationalist and sentimental affection for them—pretty much as many Englishmen without being church-goers retain a sentimental affection for the Church of England. The significant change is not that the ancient religion has been abandoned (even if that were true): but that it is viewed (except by a diminishing band of fundamentalists) in an historical light. Pride in the past is for the young Hindu of to-day no longer an obstacle to development in the future.

Of this change one very striking instance may be given. In *Gokul Chand v. Hukm Chand* (1921) 48 I.A. 162, Lord Sumner after speaking of the "accidental habit of relying on mere analogy in the application of legal rules instead of deducing the application from a logical apprehension of the principle as the best Eastern thinkers do"² went on to say that "no variations or uncertainties should be introduced into the established and widely recognized laws which govern an ancient Eastern civilization." But the direct result of his judgment was an agitation which led to the passing of the Hindu Gains of Learning Act 1930 to abrogate the ancient rule which he had enunciated. The illustration is the more remarkable in that there was no suggestion that Lord Sumner's judgment was mistaken. An attempt, a generation earlier, in the Madras legislature to reform the law on lines similar to those of the 1930 Act had broken down in face of the Hindu conservatism of that date.

6. Economic Causes.—But law, though it is made by lawyers, is made for the public; and it is the taste of the consumer, not that of the producer, which determines the form which the commodity shall take. Hindu society is changing, and requires the law to keep pace with its changes. Doctrines, in particular, about the subordination of women and the exclusion of near relatives from inheritance are but two instances of doctrines which are increasingly felt to be intolerable: and indeed some of the classical Hindu lawyers had in their day attempted to modify these doctrines.

[*July, 1947.*—The strength of the feminist movement is further illustrated by the changes made in the Code between the date of its last circulation for opinion and its introduction into the legislature. As introduced, the Code re-enacts the provision of the Hindu Women's Rights to Property Acts 1937-8 whereby the son's widow and the predeceased son's son's widow appear in the primary class of simultaneous heirs (instead of being ignored altogether as they were in the draft); it provides a place in the list of enumerated heirs for female first cousins and even on the father's side for female first cousins once removed.³

The Bombay rule by which widows of cognates have rights of inheritance in the list of cognates (though they do not exactly step into the shoes of their husbands) was to be abolished in the draft but is expressly proposed as a local law in the Bill though it is no longer to extend beyond the widow of the second cousin. The last remaining trace of the distinction between widow's estate and *stridhan* is to disappear with startling results which it is hard to think have been foreseen. (See addendum to paragraph 14.) Not only the widowed daughter but the married daughter whose husband is still living is to be entitled to main-

² Was this perhaps an example of a singularly lucid mind projecting its own image on to the material before it?

³ It must be remembered that in many Indian vernaculars there are neater names to describe such relationship than exist in English. The paternal and maternal relatives are clearly distinguished, and the clumsy word "removed" is avoided.

tenance from her father if her husband or son is unable to provide it. (Maintenance is to include in all cases, not only food, clothing and residence but also education and medical attendance.) Most remarkable of all is the improvement in the position of women with regard to adoption. A Hindu if the Bill becomes law can neither give nor take a son in adoption without the consent of his wife (or one of his wives if polygamously married before polygamous marriages become impossible) unless there is no wife capable of giving consent: and the wife's power to adopt to her husband is to be exercisable (as that great Sanskrit scholar, Mr. S. S. Setlur, half a century ago maintained that it ought to be)⁴ not merely after his death but even in his lifetime if he is disabled (e.g. by insanity) or precluded by religious vows from exercising it. Vashishta, of course, in the famous text on which the law of adoption is based, emphasized the mother's right: and it is arguable, therefore, that this is a return to classical law. But it is certainly a wide departure from recent practice. Many minor amendments also improve the position of women.]

7. Reforming Acts.—Accordingly, from 1914 onwards there has been a series of Acts effecting extensive changes in Hindu law. The earliest of these, the Hindu Disposition of Property Acts, were directed to extending still further the reception by Hindu law of principles imported from England in regard to life estates and remainders and to bringing the Hindu law, *pro tanto*, into line with the Indian Succession and Transfer of Property Acts (in which they have now been merged). There followed Acts making small but important changes in the Mitakshara law of inheritance: the Gains of Learning Act already referred to: and in 1937 (amended 1938) the Hindu Women's Rights to Property Act.⁵ This Act—at any rate in the form in which it passed the legislature—was designed to ensure that an ancient text that “a widow is the surviving half of her husband's body” should find place not only when he dies without sons, but also by making her a co-heir with the sons; by providing that she should take her husband's place as an heir to his father or paternal grandfather; and by ensuring that her husband's interest in the coparcenary property shall survive in her favour.

8. Appointment of Committee.—The Act, however, both by ambiguities of drafting and for other reasons gave rise to difficulties; and it did not go far enough to satisfy the reformers. In 1941 the Government of India, finding itself faced with no less than seven Bills before the legislature for further amendments and further changes in Hindu law, referred the whole question to a small committee. The members were only four, each of them a Hindu of unquestioned eminence and learning: Sir Narsing Rau and Dr. Dwarkanath Mitter have sat on the Calcutta High Court and have many other claims to distinction; Mr. J. R. Gharpure, the learned Principal of the Government Law College, Poona, in addition to other notable work, has done more than any other living man to make the Sanskrit law texts available to modern readers: Mr. V. V. Joshi⁶ is an advocate of the High Court of Baroda, a state which has already set an example in legislation of this kind. In addition the committee had the assistance of the late Mr. Srinivasa Iyengar, whose achievement in bringing the classic work of J. D. Mayne up to date places him permanently in the front rank. The Committee, therefore, could speak with authority not only on the law of to-day but also on its history and its most conservative traditions.

9. First Report.—They soon found that the task before them could not be adequately discharged within their terms of reference. In June, 1941, they presented their first report. They find that “the only satisfactory solution is to

⁴ *Arguendo in Lakshmbai v. Sarasyatibai* (1889) 23 B. 789.

⁵ Commonly called Dr. Deshmukh's Act from the name of the distinguished surgeon who sponsored it in the legislature. He performed, it was said, a “major operation” on the body of Hindu Law.

⁶ Mr. Joshi was succeeded as a member of the Committee by Mr. T. R. Venkatarama Sastri of the Madras Bar. The Secretary was Mr. K. V. Rajagopalan.

avoid piecemeal legislation and to take up as early as possible the codification of Hindu law"—and they proceed with impressive eloquence: "We cannot believe that even conservative opinion will be entirely unresponsive. Nor on the other hand can we believe that the thoughtful reformer will rush to lay violent hands on the ancient structure of Hindu law except for proved necessity. It is a spacious structure with many schools and by a judicious selection and combination of the best elements in each, he should be able to evolve a system which while retaining the distinctive character of Hindu law, will satisfy the needs of any progressive society. It is a Code of this kind that we contemplate: a Code which shall base its law of succession on the ideas of Jaimini rather than of Baudhayana and its law of Marriage on the best parts of the Code of Manu rather than on those which fall short of the best: a Code which generally speaking shall be a blend of the finest elements in the various schools of Hindu Law; a Code, finally, which shall be simple in its language, capable of being translated into the vernacular and made accessible to all. Such a Code will doubtless take time and many minds will have to collaborate in its preparation. But there must be many competent men and women in India who would be glad to assist in the execution of so majestic a task affecting the personal law of nearly two hundred million people."

10. The Draft Bills and Proceedings in the Legislature.—The report was accompanied by two draft Bills, each of which was laid before the Central Legislature and referred to a select committee of both houses. At this point the legislative history becomes very difficult to follow in England, since—presumably by reason of enemy action at sea—reports of proceedings of the legislature and its committee received in this country are incomplete. Only one joint select committee's report—that on intestate succession—has been available to the present writer. Of eighteen members of this committee all except two (one of whom was the Muslim⁷ chairman) signed subject to minutes of dissent on various details. Somehow or other, presumably by remission from the legislature, the whole matter was returned to the hands of Sir Narsing Rau's committee with instructions to formulate a Code of Hindu law which should be as complete as possible. They accordingly incorporated their two draft Bills—revised in the light of the suggestions made by the Joint Select Committees—with other matters in a single Code. This has been circulated to leading lawyers throughout India for criticism and eventually published for general discussion. This is the Code of which we will now give some account.

11. Powers of the Central Legislature—Agricultural Land.—At the very outset the Committee found itself in difficulties owing to the restrictions on the powers of the Central Legislature introduced by the Government of India Act, 1935. That Act provides that legislation in regard to land, including the "devolution of agricultural land" is within the exclusive competence of the provincial legislatures in the Governors' Provinces (those provinces, that is to say, which have provincial legislatures): "wills, intestacy and succession, *save as regards agricultural land*" are within the concurrent jurisdiction of the central and provincial legislatures. This is not the place to discuss in detail the wisdom or the inevitability of this division, though we may well fear that with a further weakening of the Central Legislature such as the recent Cabinet Mission to India appears to contemplate, difficulties such as it creates will become more numerous and more pronounced. At any rate, the effect of it is that a single estate, possibly a very small one, has to be arbitrarily divided in order that it may descend to different heirs or survivors by two different systems of law. Ten years after the Birkenhead legislation had removed that anomaly from English law—where at any rate it had the excuse of a long historic tradition—it is introduced for the first time

⁷ It is perhaps a good omen, though a small one, for that unity which all thoughtful friends of India must desire that Muslims in the legislature insisted, not in a contentious but a co-operative spirit, on their right to take part in the discussion of this Hindu problem.

into Indian law. The difficulty had already made itself felt by Hindus with regard to the Hindu Women's Rights to Property Act 1937 (as to which see the judgment of the Federal Court *In re the Hindu Women's Right to Property Act* I.L.R. (1941) K.F.C. 148, A.I.R. (1941) F.C. 72) and by Moslems with regard to the Shariat Act 1937: and was acutely present to the minds of the Committee who can only propound their Code to the Central Legislature with the expression of the pious hope that if that legislature is persuaded to enact it, the provincial legislatures may perhaps follow suit.

What is agricultural land, and must it always remain agricultural? At one end of the scale of wealth, how about the humble family which owns, as so many do, not only its diminutive agricultural holding but also intimately connected therewith its ancestral business; the village oilman for instance, or the village blacksmith? The separation of the two kinds of assets is almost unthinkable and must be disastrous; yet that is already the result of the two Acts above cited when read in the light of the Government of India Act, 1935. At the other end of the scale, is a great zamindari, such as Burdwan or Darbhanga, including populous towns and a wide tract of cultivated lands, "agricultural land" or is it not? It is in any case impartible so far as the law of devolution at death is concerned. The Committee's view of this question is at first sight contradictory, though they give an explanation. Impartible estates are not one of the subjects about which they propose to legislate and indeed are expressly excluded from the operation of Part II—Intestate Succession, and Part III-A of the Code. But they intend their proposals regarding adoption by a widow (Part VI and see below) to apply to impartible estates since they specifically legislate (Part VI S. 20 (3) (G)) for the case where the widow is herself the owner of the impartible estate. Their view, as stated marginally, is that, as adoption is in the concurrent list its effect on the devolution of even agricultural land must be *intra vires* the Central Legislature, a view which one may hope is correct but which is obviously open to question.

To sum up, the Committee propound their Code to deal with "all the subjects on which the Centre can legislate at present, namely Testamentary and Intestate Succession (including Maintenance), Marriage and Divorce, Minority and Guardianship, Adoption." This excludes impartible estates (except in reference to adoption), and it also excludes the enormously important subject of Religious Endowments, the law as to which calls aloud for legislative improvement and clarification. It does not exclude the joint family, the core of Hindu Law.

[July, 1947.—Given the premises on which the Government of India Act, 1935, was based, a fixed division of powers between the Central and Provincial Legislatures was inevitable. But it was, none the less, a lamentably retrograde step, the spectacle of a strong unitary state being refashioned as a confederacy being fortunately unique in the history of the world. Now that these premises have been finally acknowledged to be mistaken and Indians are to have complete control of their own affairs, it is to be hoped that the Constituent Assembly will restore the normal course of development and with it the omni-competence of the Central Legislature. It is quite sufficient for the Provincial Legislatures to have concurrent jurisdiction over local interests, and there is no need to fear a clash in practice.]

12. The Joint Family.—In Part IIIA of their Code the Committee propose to abolish the Mitakshara doctrine of birthrights, and to apply the Dayabhaga (or Bengal) doctrine to all India. In each system the income of the family is in fact enjoyed in common without specific shares and is managed by a manager (usually the father or eldest brother) acting, where possible, with the assistance of other adult male members of the family. But although the administration of the income is the same in either case, the legal theory as to the ownership of capital and land is different. In the Bengali family the sons only acquire legal ownership on the death of their father. In the Mitakshara family they acquire

by birth or adoption an indefeasible interest equal to that of their father—subject to the so-called “pious duty”—in all property which he inherited or inherits from his lineal male ancestors or in which he has such a right. That right is acquired by birth and is lost by death; their own sons, be it noted, have similarly acquired a birthright and are not prejudiced. Each male member of the family is from birth an owner of all the family property, and at his death his rights do not pass to his heirs but merge in the coparcenary body (i.e. the surviving males).

The change now proposed is the logical development of inroads which have been made on the original conception for nearly a century. English lawyers early got into the habit of regarding the surviving males on the death of a coparcener as “taking by survivorship”—a phrase which is now firmly embedded in Anglo-Hindu law, but which embodies a misconception not justified by any of the original sources. Nobody in the original conception takes by survivorship any legal rights which he had not already taken by birth: the phrase involves the fallacy of thinking in terms of definite shares. In Madras and Bombay judges held that as a coparcener can always compel a partition he must therefore be allowed to sell or mortgage his share for his private purposes—since by a well-known English equity doctrine a transferee for value can always compel his transferor to give him any remedies which might be open to the transferor. The Privy Council applied the same doctrine in a narrower field throughout British India to the case of a judgment-creditor attaching the interest of his debtor. In neither case was the innovation logically or consistently applied. The original vendor, mortgagee, or debtor remains a member of the joint family—although the doctrine was based solely on his right to partition. The rights of the purchaser or mortgagee, or in some cases even the judgment-creditor, are held (contrary to all logic and reason) to survive the death of his principal which extinguishes that principal's rights.

A further inroad on the accepted doctrine was made by the Deshmukh Acts which, as already mentioned, gave to widows proprietary rights in the coparcenary not by birth or adoption or even by marriage but by inheritance on the death of their husbands. (There is authority in ancient texts for saying that a wife *on marriage* becomes co-owner of all her husband's proprietary rights. And in the present writer's judicial experience, it was not uncommon thirty years ago for a widowed mother to be the *de facto* head and manager of the family. Nevertheless the formal change is revolutionary.)

It is impossible, therefore, to restore the Mitakshara doctrine of birth rights in its original integrity, and the Committee rightly propose to abolish it. In future there will be only one law of the joint family for all British India, just as there is even now only one economic practice. The law will be that of Bengal; the co-proprietors of the joint family will be tenants in common, not joint tenants; no one will acquire any proprietary right in the property of the joint family until the ancestor from whom he derives it is dead; and the right, when he does acquire it, will be as absolute and as freely alienable as any other form of property. An enormous annual mass of litigation arising out of such topics as the alienation of shares, the doctrine of legal necessity, and the powers of the manager will be rendered unnecessary by the simplification of the law. Even the “pious duty” will disappear; since the sons, like any other heirs, will take the inheritance subject to all debts lawfully binding on the ancestor.

True, there must be a long interim period in which further complexities will arise before this simplification takes full effect, and details are far from clear. Take, e.g., the case of a Mitakshara coparcenary in which at the moment when the Code comes into force the family property is owned by a father and two sons. It is not proposed to confiscate existing rights and this co-ownership will accordingly continue, so that on a partition each of them will take one third. But supposing the father begets a third son after the Code comes into force? Apparently, such after-born son will not take any right by birth, yet it is obviously

unjust that his rights should be less than those of his elder brothers. On the other hand, if the reform is only to operate where a Mitakshara Hindu dies leaving no sons (a view arguable from the illustration to Section III-A, though contrary to the express wording of that and the succeeding section) a far longer time must elapse before the change becomes generally operative. One may perhaps remark that the reverence for a father among Hindus is such that a sweeping confiscation of existing birth-rights of sons would be less revolutionary than might at first sight appear: in any case interim provisions will have to be devised to deal with such cases.

It remains to note that this reform, perhaps the most sweeping in the whole Code, was added after the rest of the Code was complete, and that consequential amendments in the rest of the Code appear to require further consideration.

13. Intestate Succession.—Hindu law is dominated by a single great ideal, the continuity of the patriarchal family striding on from father to son through innumerable generations. This ideal explains not only its law of inheritance, but its theories of adoption, of the property rights of women and of the family: and it is this central doctrine which is in fact being gradually weakened by modern tendencies of which the reformers have to take count. In the law of inheritance this ideal has been bound up with an ancient religious practice of offerings to the spirits of departed ancestors. The extent to which the doctrine of these offerings has moulded the law varies in the different schools of law but its influence is everywhere great. Numerous minorities of Hindus and bodies which, whether they are Hindu or not, are governed by Hindu law neither practise such offerings nor hold the religious beliefs of which they are the expression. Yet the sentiment of which those offerings and beliefs are a formal expression is so universal that in the vast majority of cases they fulfil the ideas of justice and the legal aspirations even of those who do not practise or hold them. The Courts have occasionally said that rules having a religious origin must not be applied to sects and communities which do not share the belief on which they are founded: but, in fact, it is difficult and often impossible to separate such rules from those which do apply: no one until now, for example, has attempted to work out a scheme of inheritance from which the religious element could be excluded.

The new proposals jettison completely the religious theory of the existing law: they do not make a complete break with the patriarchal sentiment which lies behind that theory, and which, as we have said, rendered it acceptable to many whose religious tenets were different. The gain in simplicity and ease of determination is enormous: but it will be accompanied by greater subdivision of inheritances; and, coupled with the abolition of birth-rights (see above), will inevitably lead to more frequent subdivision. The stability of Hindu Society is not necessarily threatened, but one of its supports is certainly weakened.

Three main categories of heirs are envisaged, namely:—

- (i) Enumerated heirs.
- (ii) Other Agnates.
- (iii) Other Cognates.

of which the first includes the widow, all descendants as far as great grandchildren and all ascendants and collaterals as far as second cousins on the father's and first cousins on the mother's side. It is divided into five (it would perhaps be clearer to say six) classes. Of these classes, the first is the "compact series" of the Mitakshara, modified by making the widow (as already provided in the Act of 1937) and the daughter "simultaneous heirs" with the male descendants. For the rest, although the original patriarchal principle is modified so as to include all near relatives, male or female, to whom the deceased might be bound by ties of affection, patriarchal sentiment is still strong. Daughters, for instance, are brought into competition with sons; but in such competition they take only half shares—a rule imported from the Muhammadan system. Generally speaking, the male line takes in preference to the female line; a son's daughter, for

instance, before a daughter's daughter. Male cousins are included but not female; and second cousins on the father's side come before the maternal grandparents and collaterals, the maternal line ceasing at first cousins.

Five simple rules are then laid down for determining priority among non-enumerated heirs, agnates and cognates. It is unfortunately not clear whether the preference of the whole to the half blood takes precedence of the other four rules; but apparently it does so since it applies also to collaterals among the enumerated heirs. In any case the theory of "religious efficacy" which bulks so large in this branch of the law according to both Dayabhaga and Mitakshara systems is to be discarded almost completely.

We may, perhaps, regret the decision to include all agnates and cognates without limit. There is a religious reason for including remote agnates: there is none whatever for including very remote cognates, and in these days when Hindus have an unrestricted power of testation there is much to be said for limiting the heirs in intestacy to descendants of the great grandparents as most modern systems of law do. Indeed, it is possible to argue that so far as cognates are concerned this was the original intention of the authors both of the Mitakshara and (save in one detail) the Dayabhaga; a view which, if correct, illustrates the modern outlook of those treatises.

All daughters are put on an equal footing, thereby abolishing a lot of rather tiresome variations between different schools of law. The inheritance rights among Sudras of the class of illegitimate sons known as *dasiputras* are to cease: and the fact that the parents (provided, of course, they are lawfully married) are of different castes is not to prejudice the inheritance rights of the offspring.

14. Intestate Succession to Women.—In the existing law this involves the two topics of *stridhan* or woman's absolute estate and the limited estate taken by certain women of whom the widow of a sonless man is the most conspicuous example. The former of these topics was a tangle of archaic and conflicting rules, which, at any rate so far as inheritance is concerned, the Committee propose to put on a simple and intelligible basis. The class of property involved is a small one; and the complexity of the present rules is out of all proportion to their importance. The only substantial innovation proposed by the committee is to give sons equal rank with daughters as heirs to their mother.

The doctrine of women's limited estate is perhaps the outstanding example of a doctrine which English judges in their anxiety to meet the religious doctrines and wishes of Hindus have pushed to a length of which few Hindus approve. It is contrary to an express text of the Mitakshara, and is buttressed by reference to certain very ancient texts about the life-long dependence of women which have very little resemblance to the conditions of the present day. It has been worked out in great detail and is one of the clearest and most settled branches of the law; and it is calculated to support the root principle of the patriarchal family. But the Committee rightly point out that it gives rise to uncertainty of titles, and to much speculative and even blackmailing litigation. They propose to abolish the doctrine altogether, and to give to the widow and other women who would have taken such an estate, in lieu thereof, an absolute estate defeasible in an uncertain future event. Such an estate is already well known in the Hindu law of Testate Succession, and the possibility of its being granted by will to a Hindu widow was recognized by the Privy Council (though in different terms) in the recent case of *Bishun Singh v. Mangla Nain* (1944) 72 I.A. 27. In future, if the Committee's proposals are accepted, a Hindu widow will have absolute power during her lifetime to deal with the estate inherited from her husband exactly as she pleases: but on her death intestate it will pass, as under the previous law, to her husband's heirs. The reform is a very salutary one.

[July, 1946.—The Bill as introduced into the legislature goes beyond the original draft and proposes to give the widow an absolute indefeasible estate in

her husband's property, not merely an absolute estate defeasible in the event of her death intestate. In cases where the husband dies leaving issue by the widow who survive her, this means merely that in her share of the estate daughters will take double shares in competition with sons, while in the portion of the estate which they inherit direct from the father sons take double shares in competition with daughters. But suppose, e.g. that she is their stepmother, her own father and mother will be preferred to her husband's children; and moreover, since by another provision of the Bill (Part I, 5 (i))⁸ illegitimate children are recognized as the children of their mother (*een moder maakt geen bastaard* as the Roman Dutch law has it) the husband's property may eventually pass to the illegitimate children of his widow to the exclusion of his own descendants. These may seem to be far-fetched contingencies, but they are only examples and others might be cited. The proposal in the draft was in accordance with what many scholars hold to be the true purport of the ancient texts. That in the Bill is nothing short of a revolution which, taken in conjunction with the largely increased number of female heirs, must eventually split up the whole structure of Hindu Society. Incidentally it appears to go further in favour of the widow than many Western systems of jurisprudence. No doubt such a contingency can be provided against by the exercise of the will-making power, but the committee's original proposal seems preferable.]

15. Testate Succession.—In respect of this, the Committee proposes no change, except that as already noted the Hindu widow will be able to dispose of her husband's estate in her hands by will. It is perhaps regrettable that opportunity is not taken to abolish the one remaining distinction between two classes of Hindu wills and make the taking of probate compulsory for all such wills alike.

16. Adoption.—Recent decisions of the Privy Council have effected a revolution in this branch of the law. The earlier decisions managed to strike a balance, not always logically clear but in practice workable, between the religious and the proprietary aspects of adoption. "Poor men" said J. D. Mayne "have souls to be saved no less than rich but we do not hear of their adopting sons": and Sir Binode Mitter in the case of *Rajendra v. Gopal* (1929) 57 I.A. 296 distinguished the two aspects clearly and held that in that particular case the property aspect was paramount. "The paramount intention" he says "which often actuates a husband to empower his wife to adopt is religious: . . . on the other hand sometimes a husband mainly from secular motives empowers his wife to adopt . . . and whether the paramount intention is religious or secular has to be ascertained." Two cases in 1933 inaugurated the revolution; that of *Bhimabai* (1933) 60 I.A. 25 which established (contrary to the weight of informed opinion in the province affected) that a widow in a Bombay coparcenary requires no authority to adopt: and that of *Amarendra Man Singh* (1933) 60 I.A. 242 from which the following may be cited:—

"In their Lordships' opinion it is clear that the foundation of the Brahmanical duty of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnisation of the necessary rites. . . . It can, they think, hardly be doubted that in this doctrine the devolution of property, though recognised as the inherent right of son, is altogether a secondary consideration." The judgment went on to quote from an earlier case "the substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property a mere accessory to it."

Amarendra's case was followed in *Vijayasinhji v. Shiv Sangji* (1935) 62 I.A. 161, a judgment delivered by Sir Shadi Lal. Finally in *Anant Bhikappa v. Shankar* (1943) 70 I.A. 232 the supremacy of religious over temporal considerations was carried so far as to involve the continued existence of an unincorporated proprietary body after all the proprietors who constituted it are dead, in other

⁸ An entirely novel provision, previously unknown to Hindu law and not in the draft.

words the existence of a legal right even though there is no one in whom the right inheres. It is noteworthy that Sir George Rankin who delivered the last-mentioned judgment, writing in this *Journal* in 1945 (p. 7) speaks of the difficulty of preventing the fiction being carried to "absurd or inconvenient lengths e.g. as regards the divesting of estates" and points out that "the religious necessity of adoption has been much exaggerated": and it is perhaps permissible to add that Sir Shadi Lal shortly after delivering the judgment in *Vijayasinhji's* case spoke to the present writer of the regret with which he had felt obliged to follow that of *Amarendra*. The uncertainty of titles created by the present law, particularly in Bombay calls aloud for legislative intervention and the Committee was bound to deal with the problem. Somewhat surprisingly, for the religious view is not universally accepted by Hindus,⁹ still less by Jains and Sikhs, they propose to treat *dattaka* adoption as purely religious; but to provide against the evils resulting from recent decisions by imposing a three years' limit. An adoption by a widow within three years of her husband's death will create a new heir to her husband and a new coparcener in any coparcenary of which he was a member (even though that coparcenary has for other purposes ceased to exist), and will as at present involve a divesting of titles. After that period has expired no titles will be affected, but that of the adopting widow herself: and the temptation to use the power of adoption for unworthy motives will be removed. The reform is excellent, though one may perhaps suggest that 280 days, the normal period of gestation, would have been a more appropriate limit than three years: *adoptio naturam imitatur*.

At the same time the opportunity is taken to clear up a great deal of the unnecessary variety and contradiction in the present law, and to abolish rules, supposed to have a religious origin, which, as the most learned Hindu scholars hold, do not result from a more careful study of the texts. Thus the adoption of boys whose natural mother the adoptive father could not legally have married is expressly permitted: the widow will require no consent to an adoption, though she must not act contrary to any expressed wishes of her late husband. The adoptive son must be under fifteen years of age, unmarried and except in the case of a *sagotra* (broadly speaking, a fellow-clansman) must not have undergone the thread ceremony. Customary adoptions of a non-religious character are hereafter to be impossible: and all adoptions are to be optionally registrable, due publicity being provided for. The adoption of daughters is expressly forbidden: although expressly permitted in the *Dattaka didhiti* of Anantadeva it has long been obsolete except in the case of dancing girls, among whom if not in itself immoral it is subject to a danger of immorality.

[*July, 1946.*—In addition to the enhanced authority of the wife and mother (see above, para. 6, addendum) innovations in the Bill as compared with the draft include:—

(a) omission of the provision that the adoptee must be of the same caste as his adoptive parents. This to an old fashioned Hindu lawyer will seem strange, it is probably explained by the fact that marriage both in the sacramental and the civil form will henceforth be possible between Hindus completely irrespective of difference of caste;¹⁰

(b) raising the age of capacity both in respect of the adopter and the adoptee;

(c) recognition of customary adoption in the *illatom*, *kritrima* and *godha* but not in other customary forms. All these the draft had proposed to abolish.]

⁹ Even among those who do accept it, adoptions in which it is hard to see any religious efficacy are not uncommon: e.g., the adoption of a married man in Bombay. These, however, will now become impossible.

¹⁰ Caste distinction is confined by definition both in the draft and in the Bill to the four *Varnas*.

17. Marriage.—Basing themselves on a famous text of Manu,¹¹ the Committee propose to make all Hindu marriages hereafter compulsorily monogamous, though without invalidating existing plural marriages. They also propose that the lunacy or idiocy of either spouse existing at the date of celebration shall render the marriage absolutely void. These provisions, and also certain provisions for separate maintenance, divorce and nullity (see below) and for the legitimacy of the children of putative marriages are to apply to all marriages. So also do the prohibited degrees of marriage which prevent marriages between near and kindred and affinity, but permit (in accordance with Vedic authority and custom in many parts of India) cross-cousin marriage and the marriage of the children of sisters¹² but not of brothers.

Within these general provisions, however, two classes of marriage are to be recognized: sacramental and civil marriage. Civil marriage is to be celebrated by declaration before a Registrar after due notice and is to be compulsorily registrable, the entry in the register being admissible in evidence of the truth of the statements contained in it. It is to be open to the parties to a sacramental marriage to register the same at their option either as a sacramental or as a civil marriage. But such registration is not compulsory.

The position of sacramental marriage is more complicated. The Committee's proposals, conservative though they are, are radical compared with those of the Joint Select Committee of the legislature; and, though they may not make any substantial difference in the marriage laws of the lower castes, will probably in their application to Brahmans arouse some opposition. They recognize as sacramental marriage one between persons of different castes—apparently without distinction which spouse belongs to the higher caste—and also widow remarriage. They jettison the complicated lore of *gotra* and *pravara*, except the prohibition against the marriage of agnate *sapindas*. But as a bar to sacramental marriage the doctrine of *sapinda*-ship remains in its most complicated form, including (though the committee do not expressly say so) the absurdity known as the doctrine of "frog's leap."

A "*sapinda*" according to the *smritis* (the sacred texts, circa 400 B.C. to A.D. 700) was one descended from a common ancestor within seven degrees on the father's or five degrees on the mother's side:¹³ and as late as the date of the Mitakshara (about A.D. 1070–1100) the doctrine was confined to agnatic relationship between the parties themselves or their mothers. But later writers, particularly Balambhatta (not before A.D. 1700) extended the doctrine till it included all descendants, agnate or cognate, of any ancestor within seven degrees on the father's side or of either grandfather of the mother.¹³

The result was an enormous list of quasi-prohibited degrees; and, so far as the texts went, the marriage of fifth cousins was on exactly the same footing as the marriage of brother and sister. It is impossible to believe that prohibitions so sweeping can have been universally observed in days when communications were more difficult than now; and there has been much difference of opinion even among Hindu scholars as to whether distant sapindaship should be regarded merely as an obstacle or as *impedimentum dirimens*. The Committee state the rule in its extreme form with admirable clearness: but they leave a loophole in the proviso that sapinda marriage except where the relationship is agnatic (i.e. *sagotra sapinda*-ship) shall not be held void if sanctioned by any custom or usage.

¹¹ (IX, 101–103) "Let mutual fidelity continue to death: this in few words may be considered as the supreme law between husband and wife. Let a man and woman united by marriage constantly beware lest, at any time disunited, they violate their mutual fidelity. Thus has been declared to you the law, abounding in the purest affection for the conduct of man and wife."

¹² Only cross-cousin marriage survives in the Bill.

¹³ In calculating degrees in Hindu law we include both the ancestor from whom and the descendant to whom the descent is traced. A great-great-grandson would be said to be in the fourth degree in English law, but in the fifth degree in Hindu law.

Such customs are known to be common; and it may be hoped that full weight will be given to the view (expressed by the Privy Council in another connection) that a marriage once celebrated must be deemed to be valid in law until the contrary is shown.¹⁴

It is to be noted that, both as regards sacramental and civil forms, marriage is defined as a union between two Hindus (including, as throughout the Code, within the term Hindu, Buddhists, Sikhs and Jains). Marriages between persons of widely different religion, Hindus, for instance with Christians or Moslems, are, however, becoming increasingly common; and one of the most crying needs of India to-day is an Act to regularize such marriages, to lay down clearly the law to govern them, and to regulate the rights and duties of the parties to them and of their children. The need for such an Act was clearly seen by Sir Henry Maine eighty years ago, but the project was dropped in face of the opposition from what a Hindu writer has called the "confederated orthodoxies" of half-a-dozen different religions. Bishops, purohits, rabbis, mobeds and mullahs found themselves in complete agreement.

[July, 1947.—A number of minor amendments in the provisions for sacramental and civil marriage call for no special comment. The Bill, however, makes an attempt to reduce the chaos of *sapinda* relationship by confining it in all cases to descendants of common grandparents through the mother or common great-grandparents through the father. It renders all future marriages, sacramental or civil, totally void unless at the time of the ceremony the bridegroom has completed eighteen and the bride fourteen years of age—or sixteen years where her guardian's consent has not been obtained. It omits the qualifications as to *gotra* and *pravara* even from sacramental marriage; and expressly enacts that even existing marriages are not to be called in question on such grounds. It removes even the prohibition on the sacramental marriage of agnate *sapindas* where such is permitted by custom, although the Committee in promulgating their draft had not ventured to oppose the strong feeling against such marriages. Finally by a curiously roundabout route it makes some, though inadequate, provision for marriage between a Hindu and a non-Hindu. By s. IV, 18, any two persons [not "any two Hindus"] between whom a ceremony of marriage in any Hindu form has been performed may apply to the Registrar to have their marriage registered as a civil marriage. Registration shall not be refused on the ground that either or even both of the parties was not at the date of the ceremony Hindu. So long, therefore, as such a marriage rests merely on the ceremony it will be open to question, but once registered it will be a valid civil marriage for all purposes. For an example of the marriages affected see *Maharaja Kumar Gopal Saran Narain Singh v. Sita Deir* (1931) 36 C.W.N. 392 and note in this *Journal* (1934) III xvi p. 121.

18. Divorce, Nullity and Separation.—The Code proposes to recognize the right of the wife to separate maintenance in a number of cases in which that right probably exists already. It provides for decrees of nullity in a number of cases—sacramental marriage between *sapindas* not recognized by custom or usage being one of them subject to the possibility of validating such a marriage (if the parties agree) by registering it as a civil marriage. It also provides for divorce in a few cases besides those in which it is now recognized among certain castes. On this point the Committee quote Mr. Srinivasa Iyengar's view "that dissolution of marriage should be allowed to a minimum extent where justification for it is of the plainest description and where it will raise the standard of morality but not to such an extent as will lead to a general loosening of the marriage tie and promote immorality and the ruin of Hindu family ideals." Both parties are put on an equal footing, and it is noteworthy that isolated acts of immorality are not a ground for divorce—only continuous concubinage or immorality is so.

¹⁴ *Inderun v. Ramasawmy* (1869) 13 M.I.A. 141.

Apostasy is a ground for divorce; but it is a little difficult to see why venereal disease must have existed in a communicable form for seven¹⁵ years before affording such relief. Perhaps the provision for separate maintenance in the case of loathsome disease is a partial answer.

19. Conclusion.—If the Code becomes law, it will lead—after the inevitable period of transition—to a far simpler and better law; and the Committee will deserve the gratitude of future generations for lightening the heavy burden which lies on the shoulders of Hindu law-students to-day. The law will not be so completely interwoven with religious doctrines as it is at present: but it will remain a religious law within the framework of which the devout Hindu can practise his religion as fully as he does to-day or has done in the past.

MALTESE LAW

[By J. M. GANADO, Esq., LL.D.]

SINCE Malta has been all through the ages joined with the Continent of Europe in its traditions and customs, Maltese law does not present something that grew up on its own, but it is an adaptation, naturally with certain typical peculiarities, of the Roman Law and the Code Napoleon; besides, in matters of Public Law, there is a happy union between the legal maxims of the Continent and the much more liberal rules evolved in English law. The great criminal law commentator, Enrico Pessina, gave expression to this thought on examining the Maltese jury system in these words: “. . . ed in generale felicemente accoppia la tradizione della scuola italiana alle libertà inglesi” (*Diritto Penale*, Vol. I, page 369); and it is indeed a characteristic which permeates the actual course of Maltese history and Maltese life.

Whether Roman Law was voluntarily adopted in Malta or not is a much controverted question. It appears to be ascertained that all Roman “Municipia” could enact separate laws; so that potentially Malta could have had laws of its own. However, there is no evidence of their existence. But, be that as it may, it is highly probable that Roman Law prevailed in these Islands before the promulgation of Justinian’s “Corpus Juris.” The Barbaric Invasions did not sound the death-knell of the work of the great Roman legists, but they were instrumental in introducing certain Nordic usages, which wrought an easily discernible change in legal thought. Malta must have also witnessed some legal and social changes resulting from the Arabic Invasion. The Maltese language with a Semitic root is a clear reminder of this domination but at the same time, the Maltese people were allowed to live a life juridically unmolested. The same may be said in regard to subsequent dominations. This continuity in the legal field remained completely unchallenged and, when in the dawn of the nineteenth century, French law was first invalidly introduced and later validly adopted as a prototype by the Maltese jurists themselves, there was a fusion of elements originating from the same sources.

It was finally with the voluntary entry of Malta into the British Empire that the public law of the Island began to be assimilated with the law of Great Britain. By means of several Proclamations published in May, 1814, Governor Sir Thomas Maitland laid down the foundations of a system of Administration which he said was to be based on “the great principle . . . that there should be a complete separation between the Executive, the Legislative and the Judicial Authorities.” (Address to the Judges delivered on January 2, 1815.)

The greatest share of self-government that Malta has ever had was during the period running from 1921 to 1933 under the 1921 Constitution. A diarchical system was set up: the Maltese Government on the one hand with a Legislature

¹⁵ Reduced by the Bill to five years; but even in five years the harm done will normally be irremediable. Other changes in the proposals regarding nullity and dissolution do not involve broad principles, nor call for comment here.

consisting of two Houses and a Cabinet and the Governor on the other hand having the power to legislate on certain Reserved Matters. In 1939 the Macdonald Constitution was promulgated; according to this Constitution, which is still in force, a Council of Government made up of eight official members, two nominated and ten elected has the power to legislate for the peace, order and good government of these Islands. Britain has now promised a re-grant of Self-Government and the drafting of a new Constitution has already been taken in hand.

From the early days of British rule it was clear that the laws of the Knights of Malta then still in force were in certain respects out of date and required modification. Eminent jurists were appointed to report on Maltese Legislation and several Commissions created to draft new Codes. In 1854 the Criminal Laws and the Laws of Organization and Civil Procedure were promulgated; in 1857 the Commercial Code, followed in 1858 by several Ordinances on Maritime Law; in 1868 several Ordinances on the Civil Law relating to Things were incorporated and in 1873 the promulgation of the law relating to Persons completed the work.

The following two excerpts from the short biography of Sir Adrian Dingli in Malta's *Law Journal* (May, 1945) may perhaps not be out of place:

"Dr. Dingli's appointment as Crown Advocate marked the beginning of a grand official career and made possible the things that were to be, i.e., the reorganization of our entire civil law system forged on Roman Law and the Code Napoleon, but at the same time reproducing our ancient laws and customs, thus respecting our national sentiments—a legal system which is entirely and essentially our own and of which everyone must needs be proud"; and later on it is stated:

"In 1856 he started his immense task and in 1873 the legal system of Malta was a completely new system fully in line with the most modern Codes of that day and, perhaps, in certain respects more progressive than other Codes. Ordinance VII of 1868 and Ordinance 1 of 1873 formed a complete Civil Code. In its general structure it closely followed its prototype, the Code Napoleon; but even a cursory examination reveals that there is constantly an original mind at work. Apart from the several titles and innumerable articles which have no counterpart in the French Code, the law presents a solution of many of the heated controversies which arose after the promulgation of the French Code, thus eliminating many doubts."

CIVIL LAW

Marriage.—The law of marriage is the Canon Law of the Roman Catholic Church; in fact the Civil Law does not make any express provision relative to the nature of marriage or its requisites; it merely devotes its attention to the civil effects, especially as regards the marital authority and personal separation. The married woman, in general, is legally incapable of performing acts of civil life without the consent or assistance of her husband, save in the case of personal separation or separation of property. From the patrimonial point of view the legal system, in the absence of contrary agreement, creates a community of acquisitions or acquets, as we commonly call it, of which the husband is the administrator and in the relations with third parties he is to be considered as the absolute owner—*vivit ut dominus*. The community of acquisitions includes the earnings and the rents of the property of the spouses and the property acquired by them even with their own personal means, saving their right to take the equivalent on the dissolution of the community. The system in itself constitutes a departure from the old Maltese custom of the *società coniugale*, the origin of which has been much controverted. Sir Antonio Micallef, an eminent Judge and President of the Court of Appeal, prefers the opinion that its source has been lost amid "the mists of antiquity" (*Codice Municipale*, Vol. I, page 321, Ed. 1841) and, evidently, that would be the safest course to follow; but a detail not devoid of

importance is that a similar institute is to be traced in the ancient Sicilian customs. The *società coniugale* involved an absolute communion between the husband, wife and issue, each owning a third, the *società* attaining perfection on the birth of the first child. This ancient custom has been substituted by the system now prevailing and parties are prohibited by s. 1280 of the Civil Code from stipulating any other partnership or community of property between them other than the community of acquests; they may also exclude the community, but they may not derogate to the rights resulting from the marital or paternal authority.

A difficulty of Private International Law on the applicability of the legal system came up for decision before our Courts of Justice. S. 1360 (1) of the Civil Code says that "marriage celebrated in these Islands shall, in the absence of an agreement to the contrary by public deed, produce *ipso jure* between the spouses the community of acquests." According to an unreported judgment of the First Hall of the Civil Court (*Smith v. Muscat Azzopardi*—1935) this provision is to be interpreted in the sense that the mere celebration of marriage in these Islands unaccompanied by domicile does not produce the Maltese community of acquests. The intention of the legislator to require domicile besides the holding of the marriage ceremony in Malta could be deduced from the second part of the article: "Marriage celebrated outside these Islands by persons who subsequently establish themselves in these Islands, shall also produce between such persons the community of acquests with regard to any property acquired after their arrival." The Court refers to Chief Justice Sir Adrian Dingli's notes (of which copies have been circulated but not printed) on the aforementioned section and to the provisions of the Code De Rohan; the sources of the sub-section under review indicate that the Maltese system is to apply *ipso jure* only in regard to people domiciled in Malta and contracting marriage in this Island. The judgment, on this point, concludes thus: "It is therefore logical to hold that the system of the community of marriage acquisitions is the legal presumption in the case of marriages celebrated in Malta between Maltese or between persons who are non-Maltese but who are domiciled in Malta."

Paternal Authority.—In the Law of Persons also worthy of note is the law of *Patria Potestas*. Before 1873 the paternal authority was of an unlimited duration; however, lifelong subjection was presumably thought to be of a rather primitive nature and *patria potestas* was made to cease on the attainment of the age of 21. Nevertheless, minority ends at 18 and this peculiarity may be deserving of some explanation. In Roman Law the paternal authority was a reflection in the family of the absolute power of the State; in Germanic law more regard was given to the natural faculties, accompanied with a more generous consideration of liberty in the family and in the State. In Malta the two Laws had their share in the evolution of our legal system and the period of minority was whittled down to 18. But, when our Code was being drafted it was thought that 18 was rather a tender age and it was established that full capacity was to be attained at 18 with three limitations: the *filius familias* until reaching the age of 21 must not sell or hypothecate immovables not acquired with his own industry, take money on loan, and withdraw capital not accumulated by means of his own work.

"Actio spolii."—An action reminiscent of Maltese historical connections is the *actio spolii privilegiata infrabimestre*, one of the possessory actions. This is the action which any possessor in the wide sense has against any person, inclusive of the rightful owner, who violently or clandestinely takes away the thing. The Canon Law dictum, *spoliatus ante omnia restituendus*, is too well known to require explanation, and this action characterized by the impossibility of opposition even of the title of ownership is a direct application of this principle, bearing on its very face the law's innate dislike of violence. The law distinguishes the *actio manutentionis* of the possessor from the *actio spolii* which is exercisable also by the simple "detentor." The first action is by law given only to the possessor, that is to say, to the one holding *animo domini*, on condition that he had not gained

possession clandestinely or through violence; the legal term is of one year. The *actio spoli* is much more favoured by the law, as its full designation demonstrates; but the legal term of three months is imposed. However, judicial decision with a view to remedying the prejudice that is consequent upon the lapse of the short term has extended the application of the *actio manutentionis* to the simple "detentor," provided that his possession of the thing was not due to clandestine or violent means.

Emphyteusis.—A contract which is very common in Malta is the contract of *Emphyteusis*. The quasi-ownership of the Immovable is transferred to the emphyteuta with the reservation of the *directum dominium* by the transferor, who has the right to exact an annual canon or ground-rent not in consideration of the real right over the immovable but in recognition of the direct ownership of the superior owner. Whole areas are under emphyteutical concessions, either perpetual or temporary, and, though in numerous cases perpetual concessions have proved to be of great disadvantage to the direct owner, it cannot be denied that they have made possible the construction of thousands of houses by enterprising individuals who possessed the energy and money but not the land.

There are special provisions aiming at avoiding doubts as to whether a contract is one of *Emphyteusis* or of Lease; it goes without saying that the effects of the two contracts are fundamentally at variance with each other: *emphyteusis* conferring a very wide real right upon the emphyteuta. Lease, according to recent judgments, produces merely a personal relation of a restricted character. The law declares that if the parties make use of the term "*emphyteusis*," the contract is a contract of *Emphyteusis*. If they employ the word "*lease*," it will be a contract of *emphyteusis*, if the duration exceeds 16 years and if the conditions agreed upon approach in a higher degree the legal regulation of *emphyteusis* rather than that of lease. During wartime, however, even if the parties employed the term "*emphyteusis*," for the purposes of the Rent Restriction Ordinance, the contract was deemed to be one of Lease, if the period stipulated is under 20 years.

Retratto or Pre-emption.—A real right which has to be taken into account in conveyances of immovable property is the right of pre-emption or, as it is traditionally known, legal *retratto*. It is the faculty granted by the law to a third person to enter into the position of the purchaser by paying him the price which had been paid over to the vendor; this faculty is therefore principally operative in Sale but it is also applicable as regards *datio in solutum* of immovables, whether free or subject to a canon, and in emphyteutical concessions. In the latter case, a special right of preference may also come into play; but, notwithstanding that the right of preference, in certain respects, presents particular features, fundamentally it is very close to the notion of pre-emption and consequently need not attract our attention. Besides the right of pre-emption there is the right of redemption, which is nothing less than a reservation by the vendor of the faculty to take the thing back on the re-payment of the price. The right of redemption ensues from the agreement and is allowed by many Continental Codes, while legal *retratto* is a right attributed by law to a third party who has some relation with the thing or with the vendor. The recognized titles of legal *retratto* are co-ownership, consanguinity and vicinity; and, as can be expected, it is generally looked upon with disfavour with the result that it has been abolished in many modern systems, as it is considered as interfering with the carrying-out of transactions. The burden imposed by this faculty conferred on third parties is undoubtedly also felt in Malta. However, our legislators must have considered that the elimination of the difficulties often following in the wake of co-ownership or servitudes or the overlying position of tenements and also the desire of retaining property within the same family dwarf all other considerations.

The general law of Obligations presents no particular features which need be

mentioned here; the special law regulating contracts furnishes a good opportunity for comparative study because there is much that is characteristic. I am choosing only two points: lesion in sale and *pactum reversivum* in donations.

Lesion in Sale.—When, contrary to the commutative nature of the contract of Sale, there is great disproportion between the objective value of the thing and the price, the Roman jurists considered that something must have been misrepresented by the vendor, and in spite of the absence of any proved defect of consent the right to rescind the sale was given to him. Later, this right was extended in common law also to the purchaser, and whilst in contemporary laws in the generality of cases it appears that the faculty to rescind is given to the vendor but not to the purchaser, Maltese law has adhered to the traditional system and has granted it to both. It cannot be gainsaid that there is greater force in the vendor's claim to protection. However, our legislature must have thought that in the case of Sale of immovable property, if no special reason concurred, there must have been something abnormal that made any one of the parties consent to a loss "*ultra dimidium*," apart from the very pertinent consideration that the value of Immovables is much more stable than that of movables. The faculty attributed by the law to both parties in Sale, and not only to one, has not worked injustice.

"Pactum reversivum."—In modern law the guiding principle in donations is the whittling down to a minimum of the possibility for the donor to re-take the thing; otherwise, the donee would evidently find himself in a somewhat precarious situation. The donor can revoke the donation only in specified cases of gross ingratitude and, of course, donations with the reservation of ownership are null. However, besides other subsidiary clauses which may be validly stipulated, the law allows the so-called *pactum reversivum*. In two cases i.e. in donations made by the adoptive father to his adopted child and in donations made by an ascendant to a descendant the *pactum* is presumed by law, but in either case there is no limitation of the right of the donee to dispose of the property and no reversion will take place if the donee leaves children who survive the ascendant or the adoptive father. Apart from the legal reversion there may be the one agreed upon by the parties—a custom which was introduced in Malta by Aragonese settlers and it may be stipulated only in relation to three cases:

1. if the donee dies without living descendants;
2. if the donee dies before the donor;
3. if the donee and descendants die before the donor.

The second and third cases are allowed in other systems of law but the first is not admitted in many Codes, because it operates not only in favour of the donor but also in favour of his heirs; and consequently the retrospective force with which the reversion is fraught will be liable to cover a much longer duration than in the other two cases.

Of a still more exceptional character are the stipulations allowed by law in donations made in contemplation of marriage; in such donations it is permissible to have what is known as a contractual institution of heir and the object of the donation may also include future property.

Registration of Conveyances.—A few lines may perhaps be devoted to the system of Registration of Conveyances which, as it stands at present, may not under all aspects be too helpful in making speedy researches into the origin of property, or, also, in certain cases in the protection of the good faith of third parties. An examination of this somewhat tricky subject would be clearly misplaced if incorporated in this article. However, it may be said, that registrations are made according to the names of the parties or according to the debtor's name in case of hypothecs, whether special or general (in our law general hypothecs are allowed). This is no doubt rather inconvenient and an alteration in the system of registrations has been proposed.

The Law of Successions.—The law of Successions occupies about one-fifth of

the law relating to Things and its general underlying spirit is in conformity with the presupposition that the owner has the right to dispose of all his property by will with certain limitations, and, when a will is lacking, the law tries to reproduce what would probably have been the intentions of the deceased. An admittedly equitable view is taken of the case of the illegitimate issue and they are given a reserved portion which like all legitims is a portion of property and not of the Inheritance. They are however incapable of receiving more than the legal reserved portion in case of the existence of legitimate or adoptive issue or children legitimated *per subsequens matrimonium*. The "illegitimate parent" is definitely not in the same position as the child but the law does not disregard the natural tie and, in addition to the right of maintenance under certain conditions, the "illegitimate parent" has the right of succession in case of intestacy, subject to sharing with the son's widow.

The reference to reciprocal bequests between spouses leads us to another matter which is perhaps peculiar to Maltese Law. It is a common sentiment that a testament should inevitably be an act drawn with the greatest freedom, and all agreements limiting the power to revoke a will, except in one singular case, are fundamentally null. The law, to ensure freedom, prohibits the making of a will by several testators together, except when the testators are spouses, in which case the will may be drawn *unico contextu* or *unica charta*. This was allowed in the old law; it is still allowed to-day and it is made use of very frequently. Nevertheless the freedom of the parties is still safeguarded, because they do not relinquish the power to revoke their wills even separately and with full secrecy. However, the spouse revoking the testament will lose the bequest in his or her favour in case a reciprocal bequest of a substantial portion of each one's property in usufruct or in full ownership had been made.

Entail.—The gradual changes effected in the law of Entail are illustrative of the liberal tendencies that have penetrated into the modern system. Up to the promulgation of the Code De Rohan in 1784 temporary or perpetual entails could be validly constituted and in fact there was quite a number of them. But after 1784 entails could not be created except for four degrees, whilst all entails hitherto created were not deprived of the effects they produced according to their constitution and to the law regulating such constitution. A difficulty has been met with in the calculation of degrees. The Court of Appeal confirming the judgment delivered on first instance in the case *Caruana v. Strickland* (Vol. xviii, pt. II, page 106) declared that "degrees" were to be reckoned by the number of possessions, so that the entail did not come to end notwithstanding that four generations might have run, if the property had not devolved on four successive possessors. The judgment was reversed by the Judicial Committee of the Privy Council on the ground that by "degree" one had to understand a generation; so that the entail came to an end when the entailed property devolved upon a person belonging to the fourth generation independently of the number of actual possessions. The law now in force prohibits all forms of constitution of entail, but gives full effect to those created before the promulgation of the law. *Fideicommissa individua* at times bring about an unjust state of affairs in the family, but the preservation of those in existence is necessary, in order to keep up the prestige of the Nobility; *fideicommissa dividua* tend to create confusion by having too many people holding in infinitesimal portions; in fact the Court of Voluntary Jurisdiction often resolves *fideicommissa dividua*.

Questions about entailed property present particular difficulties because the old laws and customs of feudal times have to be applied. The person called by the entail claims as the descendant of the founder and not as the heir of the preceding possessor; however, the entailed property devolves upon the one nearest to the last possessor and not to the one nearest to the founder, except when the line of the last possessor becomes extinct.

CRIMINAL LAW

The Criminal Laws in their substantive part are in general based on the Code of the Kingdom of the Two Sicilies on which the Maltese Commissioners based their Draft. The laws of Criminal Procedure subscribe as a whole to the accusatorial system, although they may be more properly classified as of an eclectic type. However, both in the substantive part (especially as regards fundamental general theories) and in the laws of criminal procedure, there exists much similarity with English Law. With the exception of some parts of Commercial Law, the branch in regard to which the Continental and the Anglo-Saxon legal systems are closest is the general part of the Criminal Laws. This is evinced by the frequent quotations culled from English text-books and judgments that are met with in the decisions of His Majesty's Criminal Court, not only with reference to provisions that clearly bear the marks of their British origin (e.g. the sections relating to drunkenness) but also in support of principles of general substantive law, in spite of the fact that our Criminal Law appertains to the Continental system.

Homicide.—The categories or types of homicide may here be mentioned. Whoever takes away the life of a person with the intention to kill or to put another person's life in manifest jeopardy commits *voluntary* homicide, which is still punishable with death, although several attempts to abolish the death penalty have been recorded. Then there are several cases of *justifiable* homicide which is naturally free from any punishment. *Involuntary* homicide takes place when it is due to negligence; in practice certain difficulties have presented themselves as to whether a person who with the intention of wreaking injury upon an individual, accidentally causes death, commits involuntary homicide or serious bodily harm followed by death. Directions given by Judges have not been uniform but it would appear that in such cases the provision relating to serious bodily harm followed by death ought to apply, since according to Maltese law and Jurisprudence it is an established principle that a general intention to cause bodily injury, even slight, is enough and then one will be able to judge whether it is slight or grievous bodily harm from the effects actually wrought. However, the punishment for grievous bodily harm followed by death would at times be unduly heavy; probably this consideration would have brought its weight to bear on those called upon to decide, although it goes without saying that such considerations are not of the least importance or relevance in deciding questions of law. Finally we come to *excusable* homicide which may take the following forms:—

1. if provoked by a crime against the person punishable with more than one year's hard labour or imprisonment;

2. when committed whilst resisting in daytime the scaling or breaking of enclosures, walls etc. of an inhabited apartment or of the appurtenances thereof;

3. when committed by a person who was acting under the immediate influence of an instantaneous passion or mental agitation owing to which he was, in the act of committing the crime, incapable of reflection. This sub-section has been interpreted as not necessarily referring to a case of provocation; it is enough that the prisoner be in the state therein specified on account of objective circumstances and in fact historical considerations seem to support this opinion. Lately the Criminal Court condemned to death a woman charged with having committed infanticide; the death penalty was later commuted and the matter provoked considerable discussion in the local Press. The view which appeared to have gained headway is that the law, if interpreted in the way judicial decisions actually interpreted it, provides also for the crime of infanticide; the evident inadequacy consists in the time element which, although vague, does not allow of a too generous application. It may be relevant to note that a few months ago the Criminal Code Revision Commission presented its Report making suggestions of amendments;

4. when committed by a person who, acting under circumstances constituting justifiable homicide, has exceeded the limits imposed by the law or by necessity,

unless such excess is due to such person being taken unawares or to fear or fright.

Punishments.—The punishments established in the draft Code were considered to be excessive by Mr. Jameson, a Scottish barrister, who had been allotted the task of reporting on the draft Code and on his suggestion the scale of punishments was modified. No law can ever pretend to be impeccable when it comes to be applied to the multifarious contingencies of life. Especially in the case of the extraordinary punishments imposed in wartime legislation, the punishment inflicted was not infrequently felt to be too onerous. In fact, in 1944 a law was enacted empowering the Criminal Court to disregard the minimum punishment if it came across some exceptional case which might be deserving of some mitigation. This power was not limited to wartime legislation and consequently it now forms part of the ordinary law. The Judge has to make express mention of the exceptional reason owing to which he is availing himself of the power conferred upon him by the law.

JUDICIAL ORGANIZATION

Finally some space may be assigned to the general Judicial Organization and Administration of Justice.

There are the Superior Courts and the Inferior Courts; in the former His Majesty's Judges preside, in the latter the Magistrates of Judicial Police. The Chief Justice and President of the Court of Appeal sits in the Court of Appeal together with two Judges, generally the two senior Justices. The other Courts, that is the Criminal Court, the Commercial Court and the Civil Court which is divided into two Halls (one of contentious, the other of "Voluntary" Jurisdiction), are presided over by one of His Majesty's Judges or by the Chief Justice, whenever compatible with his position as President of the Court of Appeal. The Court of Appeal is in general the Court of second instance from the judgments of the Commercial and Civil Courts in contentious matters and from the judgments of the Civil Hall of the Inferior Courts in which case the Court is composed of only one Judge. There is no appeal by right from the judgments of the Criminal Court which is ordinarily presided over by one Judge with a Jury of nine and by three Judges with a Jury of nine, whenever the possible punishment exceeds the period of twelve years.

The highest Court that can take cognisance of Maltese cases is the Judicial Committee of the Privy Council. In civil and commercial matters an appeal by right is possible in cases the subject-matter of which exceeds £500 or is of public interest. From the Criminal Court an *ex gratia* appeal may be allowed, as a recent case has actually shown. In this regard I may refer to a suggestion made in the October, 1945, number of the *Law Journal*, a publication of the University Students' Law Society. In the Editorial it is proposed that "one or two Maltese jurists" be appointed Privy Councillors, so that they may sit together with the English Judges when Maltese cases go up for decision. Once the Judicial Committee has to apply Maltese Law, as traditionally interpreted by Maltese Jurisprudence, the presence of one or two Maltese jurists will undoubtedly prove of some help. The suggestion seems to be reasonable and embodies a sentiment generally held by the Maltese legal community.

RULES OF EVIDENCE UNDER THE NEW ITALIAN CIVIL CODES

[By H. A. HAMMELMANN.]

IN 1942, only two years before the end of its activities, the Fascist regime in Italy introduced the long-awaited new versions of the Civil Code and of the Code of Civil Procedure.

Continental Codes have a habit of outliving not only the governments which created them, but whole generations, and the old Italian Codes, very closely

modelled on the French Codes of the Napoleonic era, were by this time undoubtedly due for an overhaul; great expectations had long been entertained of the first native efforts at codification of the Civil Law.

It is a misfortune that the new Codes should have made their appearance when they did. Like the Criminal, and Criminal Procedure, Code of 1930-31, the new Civil Codes are, though for intrinsic reasons to a lesser extent, tainted with Fascist influence. Authoritarian ideas, and particularly the notions of the corporate State as well as the "Labour Charter" figure prominently in the new Codes, and, as was to be expected, some of their provisions had to be repealed immediately after the fall of the Fascist regime. It is already certain that all the four big Codes are being revised and the work of reform, which has now been in hand for nearly half a century, will once more have to be continued before Italy will possess the new permanent Codes which are suitable for modern conditions.

Luckily not all the work which has gone into the preparation of these reforms has been in vain. There is, of course, a wide range of subjects in which the vitiating influence of false political doctrines can have none or only slight effect. Many of the rules concerning civil procedure contained in the new Civil Codes clearly reproduce the considered thought of the Italian legal profession; they are of interest not as a temporary innovation, but as an expression of present-day trends which will no doubt be mirrored in the same or similar form when the present work of re-drafting is concluded. This applies in particular to the rules concerning the introduction and admissibility of evidence in civil actions, and since a number of years must presumably still go by before a final version will be published, it is worth while to consider what changes from the old French system the new Codes have introduced in the field of evidence.

It is impossible to consider rules of evidence without regard to the principles of procedure under which they are being applied and therefore necessary to explain shortly the set-up of Italian Courts and Italian procedure in civil litigation. In civil matters, Italy has three Courts of first instance: the *conciliatore* who, roughly speaking, is competent for petty disputes of the value of under 1,000 lire; the court of the *pretore*, competent for matters under 10,000 lire and certain other specified disputes, and the "Tribunal" (*tribunale*) consisting of three judges, competent for all other civil actions (Art. 9 CPrciv.). We are here concerned only with procedure before the Tribunal, although most of the rules of evidence are applicable with certain modifications to the minor courts.

Under the old Italian Code of 1865, the civil courts had, according to the French model, power to delegate the preparation of the final hearing to a "commissioned judge" responsible for the reception of the evidence (Art. 208 Code of 1865), and this power had, for reasons of expediency, in both countries gradually come to be exercised in practically every case. Thus, the *enquête écrite* developed in France its dominant position and led to a civil procedure based on written reports (the *procès verbal*) which is criticized as cold, lifeless and abstract.

Recent development in civil procedure on the Continent has been towards greater realization of what Sir Maurice Amos¹ termed the "Day in Court," a trial concentrated at the final hearing (i.e. as far as possible free from interlocutory proceedings with all the delays which they involve) and based upon *viva voce* evidence given in open Court, in an effort to reduce the costs and speed up proceedings. These principles which prevail in this country are already realized in criminal trials on the Continent.

The new Italian Code of Civil Procedure has not followed this trend. The Italian lawyer Cernelutti,² writing while the Code was still in preparation, considered examination before a commissioned judge more thorough and was certain

¹ In 2 *Cambridge Law Journal*.

² *Sistema di Diritto Processuale Civile*, Padua, 1936-38, and 54 *Zeitschrift fuer Deutschen Zivilprozess*, p. 381.

that the introduction of unrestricted orality before the full Court would be impossible in Italy owing to the heavy pressure of work under which Italian Courts already laboured. Publication of the new Code has shown that he was right. The delegation of the task of preparing the final hearing and receiving the evidence was envisaged by the framers of the old Code as an alternative to expedite civil litigation: the final hearing before the full Court was still the cornerstone of the trial of the action. Under the new Code, delegation has become the invariable rule, and in these circumstances there is a very real danger, as experience on the Continent has shown, that the final hearing will degenerate into a mere formality. The first task of the Tribunal, when entrusted with a case, is the appointment of an "examining judge" (*Guidice istruttore*) whose powers are extremely wide (defined in detail in Book II, Title I, Chapter 2; art 175 ff CPrCiv).

According to the prevailing opinion the rights and duties in dispute in civil proceedings are generally rights and duties of which the parties are free to dispose, not only in the framing of their pleadings, but also in the conduct of the hearing and even in the introduction of evidence. This principle of party disposition, governed undoubtedly Italian civil procedure already under the old Code,³ but—perhaps in order to clarify the position of a strange new figure in civil proceedings, the "Public Minister" with powers to intervene in matters relating to status, family and a number of other questions (Art. 69 CPrCiv)⁴—the new Code states expressly in Art. 115, I:

"The decision of the court is based on the evidence introduced by the parties (and by the Public Minister)."

In recent years, the view has gained ground that a strictly passive attitude of the judge as arbiter between the contentions of the two parties is undesirable. As here, the judge in Italy has "nothing to do with the getting up of the case," but the discretionary powers of the judge have been substantially strengthened in the new Italian Code. Although, as in this country,⁵ he cannot call witnesses on his own unless specifically authorized to do so by the law (Art. 257, 244, 117 CPrCiv.), the judge, in addition to the powers inherent in his task of conducting the proceedings (Art. 127 CPrCiv.), has the right to invite the parties to attend for an informal examination (Art. 117 CPrCiv.), can order *ex officio* inspection of documents and real evidence either in court or on the spot (Art. 258 ff. CPrCiv.), appoint experts or "technical consultants" and has power to restrict the number of witnesses if he regards it as excessive. An interesting feature of the new Code is the power of the court to decide the case on its merits on equitable principles, but⁶ this can be done only at the application of both parties (Art. 114, 113 CPrCiv.).

Proceedings before the examining judge, during which all evidence is introduced by the parties, must be oral (Art. 180 CPrCiv.), but the examining judge is under certain circumstances entitled to delegate his duties further to a technical consultant. The hearing before the examining judge is open to the parties and their counsel only, and not public. The result of these preliminary proceedings, especially of the reception of the evidence, is embodied in a written report (*processo verbale*) which is transmitted to the tribunal when the case is ripe for decision in the view of the examining judge.

The new Code of Civil Procedure regulates in some detail the introduction before the examining judge of the various instruments of proof while other rules concerning evidence are, in accordance with Italian legal tradition, contained in the Civil Code. The new *Codice Civile* renders photographs and other mechanical

³ G. Chiovenda: *Istituzioni di Diritto Processuale Civile*, Naples, 1933-34, vol. ii, p. 289-294.

⁴ The provisions regarding the office and functions of this *ministero pubblico* are likely to be severely modified or repealed.

⁵ Cp. Lord Moulton's judgment in *Re Enoch* [1910] 1 K.B. 327.

⁶ Apart from the right of the *conciliatore* to decide disputes according to equitable principles if their value is under 600 lire.

reproductions of objects as well as photographic copies of documents admissible to prove the contents of public and private writings (Art. 2712, 2719 CC.). Provision is made in the new Codes for the production of documents, although no procedure such as our mutual discovery of documents is available; according to Art. 118, 210, 211, the parties can now be ordered, upon application of the opponent, to produce any specified relevant documents in their possession. There is no complete equivalent in Continental procedure to our writ of *subpoena duces tecum*, but third persons can, under Art. 211 CPrCiv., be required to produce specified documents; the reluctance of Continental law to interfere with the privacy of unconcerned third parties for the benefit of civil litigants is reflected in the injunction to the judge to "seek to reconcile as far as possible the interests of justice with due regard to the rights of third persons."

The examination of witnesses before the examining judge is conducted orally, but their statements, drawn up in the first person, are incorporated in the written report which will eventually be submitted to the tribunal. On account of the inevitable transposition and the absence of any opportunity of drawing conclusions about the credibility of the evidence given by a witness from his attitude during examination, which English judges rightly consider all important, the view of the evidence as it reaches the full tribunal called upon to decide the issue is of necessity second-hand and somewhat remote. This drawback is realized on the Continent even by those who believe that scientific investigation into the truthfulness of particular testimony can more effectively take place in a quiet room than in open court.⁷ It is for this reason that the new Code invites the examining judge to describe the behaviour of the witnesses (Art. 207 CPrCiv.), and to note anything else which seems to him calculated to affect the value and credibility of their evidence (Art. 116, II). The examination of the witnesses is conducted by the judge and the parties, though present, have no right to put any questions direct: there can obviously be no kind of cross-examination, and this removes what is in this country considered another essential safeguard of the reliability of witness evidence.

The witness oath, as a religious sanction of the truthfulness of the witness, has in recent years fallen into some discredit on the Continent, but the tendency to restrict it or even to omit the swearing of witnesses at the discretion of the judge is not reflected in the new Italian Code, which deals with the witness oath as a necessary part of the examination (Art. 251 CPrCiv.).

Certain circumstances concerning the person of the witness, such as his interest in the matter at hand, or weakness or immaturity of his intellect, diminish the probability of completeness and correctness of his testimony. Where these circumstances were ascertained beforehand, as in the case of family relationship to the parties in a suit, or again in the case of *non compos mentis* or infants, the law decreed complete incompetence to testify. In modern times it has been regarded better to allow all persons to testify even though their evidence may be open to suspicion, and to leave it to the court to determine how much weight should be given to their testimony, taking into account all the surrounding circumstances.

To-day interest may in certain cases give rise to privilege, but it no longer renders any witness totally incompetent to testify in an English court. New Codes on the Continent have followed the same trend and the various categories of incompetent witnesses have in the last 50 years gradually disappeared. Yet, while the Italian Code of Criminal Procedure 1931 has followed suit (Art. 350 CPrPen.), Art. 247 CPrCiv. still maintains complete incompetence of spouses to testify, even after separation⁸ and of other close family relations.⁹

⁷ *Gorphe Critique du Temoignage*, Paris, 1927.

⁸ Cp. by contrast *Shenton v. Tyler* [1939] Ch. 620.

⁹ Carnelutti (Sistema) II, p. 732, considers it desirable to "eliminate all evidence which is probably fallacious."

On the ground that children are incapable of speaking the truth, because they are incapable of distinguishing it from falsehood, some systems of law have excluded the testimony of children under a certain age altogether. It is, however, generally recognized now that capacity to give testimonial evidence cannot be settled by fixed rules, but must be left to the decision of the judge in each particular case, having regard to the mental development of each child. Moreover, elimination of the evidence of all children under a certain age creates serious difficulties for criminal proceedings, particularly prosecution for offences committed against young children which may become impossible for lack of evidence.¹⁰

In English law, the treatment of the subject is, since the Children and Young Persons Act, 1933, not identical in criminal and civil proceedings, but the difference appears due to expediency rather than policy. A distinction is now drawn between incapacity to understand the nature of an oath which renders a child incompetent in civil proceedings, and incapacity to understand the duty of speaking the truth which renders a child incompetent in criminal trials. If both things do not mean the same, it would appear that the probative value of the testimony of a child depends on his notions of truth.

In Italian law, Art. 248 CPrCiv. renders the evidence of children under 14 admissible only "where it is considered necessary in the special circumstances" and expressly excludes such children from the witness oath.

One of the most valuable features of the new Italian Code of Civil Procedure is its treatment of the question of expert evidence. Most Continental Codes have elaborated detailed rules calculated to assure that, where the court is obliged to rely on the opinions of outsiders in matters of science and technical skill, such opinions should possess the highest possible degree of impartiality and accuracy. The new Italian Code has maintained the right of the court under the 1865 Code (Art. 264 ff.) to order, in a proper case, a written expert report, even though the parties had not proposed this instrument of proof. The important innovation of the 1942 Code consists, however, in the introduction of a new type of expert, called technical consultant (*consulente tecnico*) with very wide additional powers. According to Art. 61 CPrCiv.:

"The judge may, whenever necessary, be assisted in the execution of any individual task, or throughout the proceedings, by one or several consultants of particular technical skill."

The new Code settles in great detail the appointment, position and sphere of activity of these "technical consultants." They are, in any given case, to be chosen from a list (*albo dei consulenti tecnici*) which is to be prepared at each court¹¹ and must contain at least the following categories: medicine, industry, commerce, agriculture, banking and insurance. The parties have no influence on the appointment or on the choice of the person of the "technical consultant," but whenever such an appointment by the court takes place, each party is entitled to nominate a "technical consultant" of its own who assists at all the operations of the consultant appointed by the court.

This technical consultant appointed by the court carries out his task either in the presence of the examining judge or by himself (Art. 194 CPrCiv.); in the latter case he is entitled to demand explanations from the parties and to obtain information from third persons. Where the technical consultant has acted without the examining judge, he submits a written report (*relazione*); where he sits with the examining judge, his opinion will be entered in the official record (*processo verbale*).

¹⁰ This objection applies to some extent to all rules excluding whole categories of witnesses. The fact that negro slaves in the Southern States of the U.S. were incompetent to testify against a white man, made it impossible in the first half of the last century to put a stop to the flogging practised by some farmers (Morison: "Oxford History of the United States," Oxford, 1927).

¹¹ These lists correspond to the lists of *esperti* or *periti* already previously in use at Italian courts.

The tribunal is free to act on the opinions and conclusions drawn by experts and "technical consultants" or to reject them *in toto*, but if the Continental judges are more ready to rely on expert evidence than English courts, the main reason undoubtedly lies in the fact that experts nominated by the court¹² are far better calculated to assist the court in arriving at a conclusion on difficult technical matters than experts hired by the parties, who usually turn partisan and endeavour to destroy the case of their opposite number.

Italian law, in common with all Continental systems, refuses to recognize the parties as witnesses either for or against themselves, and accordingly makes no very full provision for the reception of their evidence. Apart from the informal personal examination of the parties by the judge, according to Art. 117 CPrCiv. mentioned above, the rather cumbersome machinery of the 1865 Code for submitting questions to the parties by interrogatories is still maintained (Art. 230 CPrCiv.). The questions are formulated and notified to the adversary before the examination and the answers, which are to be given orally, are a chief means of gaining information from the parties themselves.

The imposition of the witness oath on the parties is rejected in all Continental systems and never had a place in Italian procedure. The deferred party oath, on the other hand, as an independent instrument of proof which settles the issue finally, in its various forms including the right to refer the oath back to the challenger, a procedure likened by Lord Wright¹³ to "a game of battledore and shuttlecock," still survives under the new Italian Code. A remnant from Roman law, it had some justification so long as the examination of the parties was an exceptional feature of the trial only and a party might be in danger of losing its action if he was unable to produce proof of a fact which was plainly within the knowledge of his adversary. In most countries of the Continent, the deferred oath¹⁴ has now been recognized as a dangerous expedient. In Italy, it has, however, always been regarded as a means for the speedy solution of certain disputes¹⁵ and possesses considerable importance in Italian courts, so that it is not surprising to find it still in the new Codes of 1942. (Art. 2736 ff. CC. Art. 233 CPrCiv.).

Italian law, like the French system from which it derives, has long been based on the fundamental proposition that, on principle, all evidence which has probative value should be admitted in court and open to free evaluation by the tribunal. It has not given such prominence to the study of questions of admissibility and relevance as English law, and does not contain a systematic enumeration of inadmissible evidence. There are, none the less, conditions which limit the admissibility of evidence and Art. 187, IV, imposes the duty upon the examining judge to admit instruments of proof proposed by the parties only "if they are relevant and admissible" (*ammissibili e rilevanti*). Relevance in this connection is presumably a question of fact and admissibility one of law, but the Code gives no clue to the solution.

There is in Italian law no equivalent to the opinion rule, but the source from which a witness has gained his knowledge must be stated in order to ascertain whether the facts put forward are of any value, and if so, how much importance should be attached to them. Nor is hearsay evidence mentioned as such in any of the Italian Codes, but the new Code of Civil Procedure does contain an interesting provision which concerns the question as to how far hearsay evidence should be admissible so long as direct witnesses could be called. Art. 257 CPrCiv. states:

"If a witness refers to another person from whom he has learned the facts

¹² Envisaged in R.S.C. O. XXXVII A, but only upon application of the parties which is very rarely made.

¹³ In 42 *Law Quarterly Review*, 345.

¹⁴ Which still exists in Scots law.

¹⁵ Chiovenda II, p. 417-18.

to which his evidence relates, the examining judge may *ex officio* order that this person be called as a witness to give testimonial evidence."

Of considerable importance in French and Italian law are the general restrictions placed on the admissibility of testimonial evidence to prove mutual agreements and contracts. The new Italian *Codice Civile* has not only, in Art. 1350 CC. increased the number of cases in which a solemn document in special form is required for the validity of certain transactions, which corresponds to the requirements of a deed e.g. for the transfer of land, but has also kept in force the general rule according to which certain transactions, and above all all contracts involving a certain sum of money, can only be proved in a court of law by the introduction of evidence in writing.

In this country, evidence in writing to the exclusion of parol evidence is required only under a few Statutes, such as the Statute of Frauds 1677 s. 4 and the Sale of Goods Act (1893) s. 4 ss. 1, which provide that certain contracts shall be unenforceable unless there is a memorandum or note in writing signed by the party to be sued. Even these restrictions on the freedom of the parties to make their agreement in whatever form they choose have been condemned and the Law Revision Committee, in its 6th Report, has proposed their abolition.

The new Italian Codes have, despite much discussion and recent criticism, maintained a general restriction on witness evidence which is excluded for proof of contracts exceeding 5,000 lire in value.¹⁶ In their interpretation of Art. 1347, 1348 of the old Civil Code of 1865, Italian courts had made considerable efforts to overcome some of the inconvenience and difficulty caused in daily life by the demand for writing. The new Code, in Art. 2724, has taken full account of these efforts, which are now amplified and given the force of statutory law, so that, where one party has from the outset been faced with "moral or material impossibility of procuring written proof" or where one of the parties has without fault of his own lost the document, the rule excluding witness evidence gives way. In addition, the new Civil Code has now granted the court discretionary power, the practical scope of which is not quite clear, to admit testimonial evidence even in excess of the legal limit; according to Art. 2721, II:

"The judge may consent to admit testimonial evidence beyond the aforesaid limit, having regard to the position (*qualità*) of the parties, the nature of the contract and any other circumstances."

The old Code excluded testimonial evidence to vary, add to or contradict a written document by testimonial evidence of a previous, contemporaneous or subsequent agreement.¹⁷ The new Code, however, expressly admits oral evidence of subsequent agreements, provided:

"... having regard to the position (*qualità*) of the parties, the nature of the contract and other circumstances, it seems likely that such additions or modifications have in fact been made by word of mouth" (Art. 2723 CC.).

This again, though in contrast with French law, is in line with English decisions which admit parol evidence of a subsequent agreement between the parties varying the terms of the original contract.¹⁸

With regard to privilege, the right of a witness to abstain from giving certain evidence (*facoltà d'astensione*), the new Code of Civil Procedure refers to the rules of the Code of Criminal Procedure, and thus establishes uniformity of treatment in both criminal and civil proceedings. Of special importance and scope in Italy is "professional privilege" which covers all matters which have been confided to or have become known to Ministers of religion, legal advisers and doctors by reason of their profession (Art. 351 CPrPen.). In this country, professional

¹⁶ 500 lire, the sum originally mentioned in the old Code, was increased to 2,000 lire in 1922; the new figure only takes account of the increasing devaluation of Italian currency.

¹⁷ *Cp. Burges v. Wickham* (1863) 3 B. & S., per Blackburn J., at p. 696.

¹⁸ *Goss v. Lord Nugent* (1833) 5 B. & Ad. at p. 64.

privilege is limited to the special relation between solicitor (or barrister) and client and its strict limits even within this sphere are illustrated by *Minter v. Priest*.¹⁹

When the reception of the evidence before the examining judge is completed, and its results have been embodied in the written official report, the material is submitted to the tribunal for final decision in public hearing and in the presence of the parties and their counsel. The tribunal decides the case on the basis of these written documents, together with such additional submissions as the parties may be allowed to make at the discretion of the President of the tribunal. On principle, the tribunal is entirely free in assessing the weight of evidence submitted by the parties in accordance with the personal opinion of the judges concerning its reliability and credibility, except where the law determines otherwise (Art. 116 CPrciv.).

Rules restricting or excluding the freedom of the court to credit or disbelieve any particular evidence submitted have become as rare in Italy as they are in England, and in general the weight of the evidence does not depend on its quantity. The most important exception in the Italian Civil Codes is the binding and conclusive force of the deferred oath, which obliges the tribunal to give a decision in accordance with the oath, even against the private conviction of the judges. The evidence provided and the material accumulated by the technical consultant and by other experts is, on the other hand, completely open to the evaluation by the tribunal.

On the whole, it must be said that the sections of the two new Codes governing the introduction and the admissibility of evidence have not fulfilled the expectations which some lawyers had expressed during the long preparation of the drafts. So far as the rules of evidence are concerned, the two Codes contain some interesting features, especially the introduction of the "technical consultant," which is a striking extension of the French treatment of expert evidence, and in a minor degree also the grant of somewhat wider discretionary powers to the judge receiving the evidence. On the whole, however, the legislator must be considered to have proceeded in an extremely cautious manner and indeed to have failed to tackle consistently some of the most doubtful points of the old system, such as the practical difficulties arising out of the inadmissibility of testimonial evidence for the proof of contracts and such anachronisms as the deferred oath in its various forms as conclusive and binding evidence. Although the Italian example may be of some value to those Continental countries which are now facing the task of reforming their civil procedure, it is unlikely that, at least in this field, any Italian Codes proceeding on similar lines can gain the outstanding position as a model which the French Codes possessed during the nineteenth century on the Continent.

ENEMY LEGISLATION AND JUDGMENTS IN LIBERATED COUNTRIES BELGIUM

[Contributed by PAUL DE VISSCHER, Professeur à la faculté de droit de l'Université de Louvain.]

AVANT de décrire quel a été le sort réservé à la législation de guerre en Belgique, il convient de rappeler que, durant les années 1940-1944, le territoire belge a été régi simultanément par deux législations et deux administrations différentes.

En effet, immédiatement après avoir pris possession de la capitale, l'autorité militaire allemande déclara qu'elle souhaitait voir les Belges s'administrer eux-mêmes dans toute la mesure du possible par l'entremise des autorités belges restées en territoire occupé. En faisant cette déclaration, l'Allemagne poursuivait d'abord un but de propagande. En effet, l'Administration militaire allemande,

¹⁹ [1930] A.C. 558.

au cours de la guerre 1914-1918, avait laissé de très mauvais souvenirs à tous les Belges dont l'Allemagne hitlérienne espérait avec quelque naïveté se concilier les sympathies en leur garantissant une certaine autonomie dans leur administration journalière. D'autre part, en invitant les autorités belges à assumer elles-mêmes l'administration journalière du pays occupé, l'autorité allemande espérait réaliser une économie appréciable d'hommes et de fonctionnaires qui pourraient ainsi être utilisés sur d'autres théâtres d'opérations.

L'administration belge à laquelle cette offre était adressée en 1940, se trouvait complètement désorganisée. En effet, le Roi, Chef de l'Exécutif, était prisonnier de l'ennemi et se refusait à toute activité politique. Les Ministres qui avaient décidé de continuer la lutte dans le camp des Alliés jusqu'à la libération du territoire, se trouvaient privés de toute communication avec la Belgique. En territoire occupé, les plus hautes autorités administratives étaient les premiers fonctionnaires permanents des Départements ministériels, les Secrétaires Généraux. C'est à eux que s'adressait l'offre de l'autorité allemande. Après quelques hésitations, ils se décidèrent à accepter cette offre, tout en prenant soin de préciser qu'ils assumeraient la gestion administrative du territoire occupé, non pas en tant que délégués de l'autorité allemande, mais bien en tant qu'organes de la souveraineté belge.

Et, de fait, les Secrétaires Généraux des Ministères n'avaient aucun besoin de faire appel à un mandat de la puissance occupante pour justifier leur pouvoir d'administrer le territoire occupé. En effet, cette justification se trouvait dans la législation belge sous la forme d'une loi votée à la hâte à l'aube du 10 mai 1940 (*Monit. B.*¹ 11 mai 1940). L'objet essentiel de cette loi était d'assurer le fonctionnement des services administratif et judiciaire au cas où ces services se verraient dans l'impossibilité de communiquer avec leurs supérieurs hiérarchiques. L'article le plus important de cette loi, l'article 5, disposait notamment :

"Lorsque, par l'effet des opérations militaires, un magistrat ou un fonctionnaire, un corps de magistrats ou de fonctionnaires . . . est privé de toute communication avec l'autorité supérieure dont il dépend, ou si cette autorité a cessé ses fonctions, il exerce, dans le cadre de son activité professionnelle et pour les cas d'urgence, toutes les attributions de cette autorité."

Cette disposition s'appliquait incontestablement aux divers Secrétaires Généraux qui, par l'effet des opérations militaires, se trouvaient dans l'impossibilité de communiquer avec leurs supérieurs immédiats, les Ministres.

C'est donc en se fondant sur cette loi belge de délégation que les Secrétaires Généraux des Ministères assumèrent l'administration journalière du territoire occupé et ceci explique pourquoi, lorsque nous parlons du sort des actes réglementaires accomplis au cours de l'occupation, nous devons envisager d'une part les actes accomplis par les Secrétaires Généraux des Ministères et, d'autre part, les actes et ordonnances de l'autorité militaire allemande qui entendait ne pas renoncer à exercer les pouvoirs que lui reconnaissait la Convention de La Haye de 1907.

I. Les Actes des Secrétaires Généraux des Ministères

(a) *L'interprétation donnée à la Loi du 10 mai 1940 sous l'occupation.*— L'article 5 de la Loi du 10 mai 1940 avait un sens précis. Il permettait à chaque Secrétaire Général d'exercer, en cas d'urgence et dans le cadre de son activité professionnelle, les attributions de son supérieur hiérarchique immédiat, c'est à dire de son Ministre. Il ne permettait pas aux Secrétaires Généraux, agissant individuellement ou collectivement, d'exercer les pouvoirs du Conseil des Ministres, du Roi ou du Parlement. En bref, la loi du 10 mai 1940 permettait

¹ Abbreviations.—*Appel* : Arrêt de la Cour d'Appel de . . . *Cass.* : Arrêt de la Cour de Cassation. *J.P.* : Jugement du Juge de Paix de . . . *J.T.* : Journal des Tribunaux. *Monit. B.* : Moniteur belge. *Pas.* : Pasirisie belge, recueil général de la jurisprudence des Cours et Tribunaux.

aux Secrétaires Généraux d'accomplir des actes de pure administration en respectant les lois en vigueur.

Très rapidement il apparut aux Secrétaires Généraux, qu'interprétés de cette façon, leurs pouvoirs étaient trop restreints et ne leur permettraient pas d'épargner à la Belgique une législation et une administration allemandes. C'est ainsi, notamment, que la stricte interprétation de la Loi du 10 mai 1940 interdisait aux Secrétaires Généraux de lever des impôts puisque ce droit est réservé par la Constitution même à la décision du pouvoir législatif. De même, les Secrétaires Généraux ne pouvaient ni abroger, ni modifier, ni compléter les lois en vigueur à la date du 10 mai 1940.

Placés devant l'alternative de devoir renoncer à la tâche qu'ils avaient entreprise avec l'appui de la grosse majorité de l'opinion publique, ou de devoir violer la loi du 10 mai 1940, les Secrétaires Généraux adoptèrent ce dernier parti et n'hésitèrent pas à édicter des mesures que la Constitution réservait à la décision du Roi, voire même du pouvoir législatif. Cette interprétation extensive de la loi du 10 mai 1940 fut ratifiée par les Cours et Tribunaux (*Cass.* 3 nov. 1941 *Pas.* 1941. I. 407; *Cass.* 25 août 1943. *Pas.* 1943. I. 337).

La situation se modifia sensiblement vers les années 1941-1942. Vers cette époque, certains Secrétaires Généraux, cédant aux menaces et aux pressions de l'ennemi, édictèrent des arrêtés manifestement inspirés de l'idéologie allemande. D'autres Secrétaires Généraux, ayant refusé de céder devant les menaces de l'ennemi, furent révoqués par lui et remplacés par des hommes ambitieux gagnés aux idées allemandes. Aussi, à partir de cette époque, les Secrétaires Généraux n'hésitent plus à édicter des arrêtés en violation des lois et de la Constitution, prétendant qu'aux termes mêmes de la Loi du 10 mai 1940 ils étaient en droit d'exercer les pouvoirs du Roi prisonnier et, notamment, les pouvoirs spéciaux qu'à la veille de la guerre le Parlement avait accordés au Roi par l'effet d'une loi exceptionnelle, la Loi du 7 septembre 1939. Devant cette tendance inquiétante, les Cours et Tribunaux commencèrent par refuser leur concours à l'application des arrêtés des Secrétaires Généraux et la Cour de Cassation n'hésita pas à proclamer, le 30 mars 1942, l'illégalité d'un arrêté créant des juridictions administratives, véritables tribunaux d'exception en matière de ravitaillement (*Pas.* 1942-I-75). Cette résistance du pouvoir judiciaire provoqua aussitôt une réaction de la part de l'autorité allemande qui menaca de procéder à l'arrestation des magistrats qui refuseraient de reconnaître force de lois aux arrêtés des Secrétaires Généraux. La situation était grave, car, une fois de plus, le pays était menacé de se voir imposer une administration purement allemande, à l'exemple des Pays-Bas. Au dernier moment, alors que les Cours et Tribunaux étaient sur le point de décréter la grève, des négociations furent engagées entre les représentants du pouvoir judiciaire et les Secrétaires Généraux. Ces négociations aboutirent à un accord aux termes duquel le pouvoir judiciaire se déclarait prêt à admettre que les Secrétaires Généraux étaient en droit d'exercer les pouvoirs spéciaux du Roi, c'est-à-dire d'édicter des arrêtés ayant force de lois. En échange, les Secrétaires Généraux s'engageaient à ne plus prendre de mesures de caractère politique. Cet accord est constaté dans l'exposé des motifs d'un arrêté des Secrétaires Généraux du 19 juin 1942 (*Monit. B.* 4 juillet 1942). En conformité avec cet accord, la Cour de Cassation abandonna sa première jurisprudence et, par un arrêt du 27 janvier 1943 (*Pas.* 1943-I-33), reconnut force de lois aux arrêtés des Secrétaires Généraux. C'est ainsi que, dans le but d'épargner au pays une administration purement allemande, la Cour de Cassation se fit complice d'une illégalité en attribuant à la Loi du 10 mai 1940 une portée qu'elle ne possédait manifestement pas.

Pareille illégalité se devait d'être redressée au lendemain de la libération du territoire car, malgré leur promesse, les Secrétaires Généraux avaient continué à transformer les institutions belges dans le sens voulu par l'ennemi. Le rétablissement de la légalité ne pouvait être abandonné à la décision du pouvoir judiciaire

qui avait, dans une trop large mesure, prêté l'appui de son autorité aux arrêtés illégaux des Secrétaires Généraux. C'est la raison pour laquelle le Gouvernement belge siégeant à Londres adopta d'autorité une série de mesures de caractère législatif réglant le sort des actes accomplis sous l'occupation par les Secrétaires Généraux des Ministères.

La plus importante de ces mesures est l'Arrêté-Loi du 1er mai 1944 (*Monit. B.* 1 sept. 1944) qui porte interprétation de la Loi du 10 mai 1940. Aux termes de cet Arrêté-Loi, la Loi du 10 mai 1940 devra être interprétée par les Cours et Tribunaux en ce sens qu'elle " n'a délégué aux Secrétaires Généraux ni le pouvoir exécutif ni le pouvoir législatif."

Ainsi s'effondrait la jurisprudence que la Cour de Cassation avait établie sous l'occupation. Du même coup s'écroulait toute l'oeuvre législative et une grande partie de l'oeuvre réglementaire et administrative des Secrétaires Généraux. L'Arrêté-Loi du 1er mai 1944 étant une disposition interprétative avait, par nature, effet rétroactif et remettait en question de nombreuses situations acquises. C'est pour parer aux désordres qui auraient pu en résulter que le Gouvernement belge de Londres fit rapidement suivre l'Arrêté-Loi du 1er mai 1944 par une nouvelle disposition législative, l'Arrêté-Loi du 5 mai 1944 (*Monit. B.* 1 sept. 1944) qui règle en détail le sort des arrêtés des Secrétaires Généraux. Notons dès à présent que les Arrêtés-Lois des 1er et 5 mai 1944 étant de véritables lois s'imposaient au respect des Cours et Tribunaux qui durent les appliquer sans pouvoir en contester ni l'opportunité ni la constitutionnalité.

(b) *L'Arrêté-Loi du 5 mai 1944.*—Le système établi par l'Arrêté-Loi du 5 mai 1944 est complexe et nous ne pouvons songer qu'à en indiquer ici les lignes les plus générales. Le lecteur désireux d'être renseigné de manière plus complète à ce sujet consultera le texte de l'Arrêté-Loi du 5 mai 1944, texte qui est précédé d'un exposé des motifs détaillé. (Voy. également le commentaire de cet Arrêté-Loi par M. C. Cambier dans *Journal des Tribunaux*, 1944, p. 5.)

Parmi les actes accomplis par les Secrétaires Généraux, il en est qui sont annulés, il en est qui sont réputés temporairement valables, il en est d'autres qui sont validés.

1. L'article 1 de l'Arrêté-Loi du 5 mai 1944 annule (en principe avec effet rétroactif), 38 catégories d'arrêtés qui sont présumés avoir été édictés en violation manifeste de la Constitution ou sous la pression de l'ennemi. Dans cette énumération on relève notamment les arrêtés portant création des grandes agglomérations, de l'Ordre des Médecins, de la Corporation de l'Agriculture, des conseils culturels, des juridictions administratives, etc.

2. L'article 2 du même Arrêté-Loi annule de la même manière les mesures administratives telles que: promotions, nominations, révocations, etc., qui ont été prises, soit par des Secrétaires Généraux irrégulièrement nommés, soit par des Secrétaires Généraux réguliers mais qui auraient excédé les limites de leur compétence.

3. Tous les autres actes des Secrétaires Généraux pris en dehors de limites de la Loi du 10 mai 1940, sont réputés temporairement valables pour une durée de douze mois à compter du jour de la libération du territoire, date à laquelle ils seront considérés comme abrogés pour l'avenir. Toutefois durant un délai de dix mois à compter du jour de la libération du territoire, le Roi peut annuler ces arrêtés (avec effet rétroactif) ou les abroger.

4. Les articles 4 et 5 de l'Arrêté-Loi du 5 mai 1944 confèrent au Roi des pouvoirs spéciaux en vue de prendre, pendant un délai d'un an à compter de la libération du territoire, toutes les mesures transitoires nécessaires pour assurer la sauvegarde des intérêts que l'annulation des arrêtés des Secrétaires Généraux pourrait mettre en péril. Le Roi peut, ainsi, soit remettre provisoirement en vigueur des arrêtés déclarés nuls, soit décréter le maintien des effets acquis découlant des actes déclarés nuls. C'est grâce à cette disposition que l'on a pu, notamment considérer comme acquis au Trésor le produit des impôts illégaux et

que l'on a pu, de même, considérer comme acquis au profit des fonctionnaires illégalement nommés les montants échus de leurs traitements.

L'Arrêté-Loi du 5 mai 1944 règle également le sort des actes accomplis par des autorités administratives autres que les Secrétaires Généraux, fonctionnaires inférieurs de l'autorité centrale, magistrats de l'ordre judiciaire ou fonctionnaires locaux.

L'article 5 envisage d'abord le cas des actes accomplis par des fonctionnaires irrégulièrement nommé mais qui, pour le surplus, ont respecté les conditions de fond et de forme de leur compétence légale. Tel est le cas, par exemple d'un mariage célébré par un officier de l'état-civil irrégulièrement nommé. Ces actes sont présumés réguliers. Toutefois, le Roi est autorisé à les annuler lorsque, de l'avis de son Conseil des Ministres, il estime qu'ils ont été accomplis en violation des lois ou en opposition avec l'intérêt général.

Quant aux actes accomplis par des fonctionnaires incompetents *ratione loci* ou *ratione materiae*, ils sont réputés nuls, mais le Roi peut décider qu'ils seront simplement abrogés pour l'avenir. Il peut même, lorsque l'intérêt général le commande, les valider purement et simplement. Tel fut le cas de la plupart des décisions prises par les collèges échevinaux qui se sont vus dans l'obligation de parer à l'absence des conseils communaux illégalement supprimés par les Secrétaires Généraux.

* * *

Telles sont les grandes lignes de la solution consacrée par l'Arrêté-Loi du 5 mai 1944 qui a entendu entrer dans les moindres détails en vue d'éviter que la jurisprudence qui, au cours de l'occupation, avait adopté une interprétation extensive de la Loi du 10 mai 1940, ne retombe dans ses erreurs passées. Malgré sa complexité, il est permis de dire que la solution adoptée par l'Arrêté-Loi du 5 mai 1944 a permis un retour rapide et sans heurt à la légalité. Entre le maintien prolongé d'une législation qui était odieuse à la population et l'annulation brutale et aveugle de cette législation, le législateur belge a adopté une solution moyenne et nuancée qui est bien significative du bon sens et de la modération de nos populations.

(c) *Dispositions particulières.*— Suspension de Délais: Les faits de guerre ont contraint le législateur à se préoccuper d'assurer la sauvegarde des intérêts de ceux, militaires ou prisonniers, qui se trouvaient dans l'impossibilité d'agir dans les délais prescrits à peine de déchéance ou de nullité par la Loi. Ces délais, en matière civile, commerciale, fiscale, pénale et administrative, ont donc été suspendus par la Loi du 24 juillet 1939 (*Monit. B.* 12 août 1939), complétée par les Arrêtés-Lois des 13 et 15 mai 1940 (*Monit. B.* 14 et 16 mai 1940). Au cours de l'occupation, cette législation fut progressivement abrogée par les Secrétaires Généraux (Arrêté du 4 octobre 1940. *Monit. B.* 6 oct. 1940).

En prévision de la libération du territoire et des désordres que celle-ci allait jeter dans les communications, de nouvelles suspensions de délais furent accordées par le Gouvernement belge de Londres le 1er mai 1944 (*Monit. B.* 5 sept. 1944). Cette législation d'exception a été partiellement abrogée par l'Arrêté-Loi du 19 mars 1945 (*Monit. B.* 1er avril 1945), et, à l'heure actuelle, les suspensions de délais ne profitent plus en fait, qu'aux prisonniers politiques ou de guerre ainsi qu'aux déportés qui ne seraient pas encore rentrés de captivité.

Revision des Condamnations prononcées durant l'occupation: Au cours de l'occupation, les citoyens belges étaient jugés par des tribunaux belges pour violation des lois belges et par les tribunaux militaires allemands pour violation des ordonnances allemandes. Les condamnations prononcées par les tribunaux militaires allemands ne demandaient pas à être soumises à revision. Du fait de la libération du territoire, ces condamnations sont devenues sans effet et leurs victimes recevront éventuellement réparation des dommages subis au titre de dommages de guerre.

En ce qui concerne les condamnations prononcées par les tribunaux belges sur base de la violation des arrêtés des Secrétaires Généraux, elles ont été tantôt

annulées, tantôt validées suivant le système général décrit plus haut. Toutefois, ce système se révéla insuffisant. En effet, au cours de l'occupation certains citoyens, membres des forces de la Résistance, furent condamnés du chef de meurtres, vols, pillages ou autres délits de droit commun par des magistrats belges qui ignoraient le but patriotique qui les avaient déterminé à agir. De telles condamnations ne pouvaient être maintenues après la libération du territoire. C'est la raison pour laquelle un Arrêté-Loi du 22 juin 1945 (*Monit. B.* 11 juillet 1945) a autorisé la revision de toutes les condamnations prononcées du chef d'infractions commises "uniquement en vue de la résistance à l'ennemi."

II. *Les Ordonnances de l'Autorité Militaire Allemande.*

Ainsi que nous l'avons noté au début de cet exposé, l'existence en territoire occupé d'une administration belge a épargné à l'autorité allemande le souci de l'administration journalière de ce territoire. Toutefois, l'occupant n'a jamais renoncé à l'exercice des pouvoirs de fait que lui accordait la Convention de La Haye. Au contraire il usa de ces pouvoirs pour édicter de sa propre autorité de nombreuses ordonnances dont l'application était assurée par ses propres juridictions militaires. Ces ordonnances avaient spécialement pour objet d'assurer la sécurité de l'armée allemande ou d'imposer à la population belge des obligations que l'Allemagne jugeait indispensables à la poursuite de la guerre totale: ordonnances sur la propriété ennemie, sur les juifs, sur les déportations de travailleurs.

Jamais ces ordonnances n'ont été appliquées par les Tribunaux belges. En effet, conformément à la jurisprudence fixée au cours de la guerre 1914-1918, la Cour de Cassation a toujours considéré que les juridictions belges étant des organes de la souveraineté belge, n'avaient aucune compétence pour appliquer des ordonnances que l'autorité allemande édictait en se fondant sur la Convention de La Haye.²

Au lendemain de la libération, cependant, les Cours furent appelées à trancher certains litiges dans lesquels les parties invoquaient des ordonnances allemandes. Ce fut l'occasion pour les Cours de rappeler la portée et la nature exactes du pouvoir de fait que la Convention de La Haye reconnaît à l'autorité d'occupation.

Dans une première série de litiges, la question en discussion était celle du pouvoir de réquisition de l'armée d'occupation. En invoquant les articles 52 et 53 du règlement annexé à la Convention de La Haye de 1907, l'autorité allemande avait procédé à de nombreuses réquisitions de véhicules automobiles. Loin d'utiliser ces véhicules "pour les besoins de l'armée d'occupation," l'armée allemande avait aussitôt revendu ces véhicules, prouvant ainsi que les réquisitions étaient opérées dans un but de spéculation totalement différent du but admis par le règlement de la Convention de 1907. Au lendemain de la libération du territoire, les propriétaires dépossédés revendiquèrent leurs biens dans les mains de ceux qui les avaient acquis de l'autorité allemande. Les ventes intervenues dans ces conditions entre l'autorité allemande et les tiers acquéreurs étaient-elles valables? Sans hésitation, les Cours et Tribunaux déclarèrent ces ventes nulles pour cette raison qu'en réquisitionnant des véhicules dans un but étranger aux besoins de l'armée d'occupation, l'autorité allemande avait excédé les limites du pouvoir de fait que lui reconnaissait la Convention de La Haye.

Statuant dans une espèce semblable, la Cour d'Appel de Liège déclare dans un arrêt du 14 juin 1945 (*J.T.* 1945, 503):

"Attendu que la tractation ne revêt pas les formes d'une réquisition régulière et qu'elle n'est pas au fond la réquisition prévue et tolérée par les articles 52 et 53 de l'annexe de la Convention de La Haye du 18 octobre 1907 approuvée par la Loi belge du 25 mai 1910;

Qu'en effet, le camion enlevé à l'appelant n'était pas destiné aux besoins

² *Cass.* 4 déc. 1919. *Pas.* 1920-I-1; *Cass.* 27 janv. 1918. *Pas.* 1918-I-177; *Appel Gand*, 15 juin 1921. *Pas.* 1921-II-123; *Appel Liège*, 7 juin 1945. *J.T.* 1945, 530; *Cass.* 24 août 1944. *Pas.* 1944-I-457; *Cass.* 30 nov. 1944. *Pas.* 1946-I-501.

de l'armée d'occupation en Belgique puisque, dès le lendemain de l'entrée en possession il fut rétrocedé dans les formes d'une vente publique; Attendu que si l'article 53 de la Convention de La Haye prévoit la saisie par l'occupant des moyens de transport appartenant à des personnes privées, il stipule expressément que ces moyens devront, après leur utilisation, être restitués et les indemnités réglées à la paix; Qu'ainsi donc, l'occupant ne peut en disposer en faveur de tiers puisqu'il se met ainsi dans l'impossibilité d'effectuer la restitution en nature; Qu'au surplus, il n'y a pas eu utilisation, puisque jamais l'autorité allemande n'a fait usage du camion dont s'agit; Attendu qu'il suit de ces considérations que l'on se trouve en présence d'un acte de spoliation prévu par l'Arrêté-Loi du 10 janvier 1941."³

Dans une seconde catégorie de litiges, les Cours et Tribunaux eurent à trancher la question de savoir si les locataires d'immeubles appartenant à des ressortissants juifs ou ennemis et qui avaient été placés sous séquestre par l'autorité allemande, pouvaient se considérer comme libérés de leur dette par le paiement qu'ils avaient fait du montant de leurs loyers entre les mains d'un "Verwalter" allemand. Les Cours et Tribunaux répondirent négativement en déclarant que l'occupant ne possède pas, aux termes de la Convention de La Haye, le droit de porter atteinte à la propriété privée.

Dans une espèce de ce genre, le Juge de Paix d'Ixelles rendit le jugement suivant:

"Attendu qu'il y a lieu d'examiner si l'autorité occupante a agi conformément aux lois et usages du droit international public; Attendu que la deuxième Convention de La Haye du 18 octobre 1907 vise à la section II les droits de l'autorité militaire sur le territoire de l'Etat ennemi; que l'article 46 déclare que le pouvoir militaire doit respecter la propriété privée et ne peut la confisquer;

Attendu qu'il suffit de lire le texte de diverses ordonnances allemandes pour se rendre compte que toutes ces dispositions contre les sujets juifs ont le caractère d'une véritable spoliation des biens; Que l'autorité allemande a procédé à des déportations, des incarcérations et des confiscations de biens, ce sans aucun fondement juridique et contrairement aux dispositions du droit international public; Que toute la législation allemande contre les juifs devait aboutir à la confiscation de leurs biens et à l'extermination de leur race; Que ces lois iniques sont contraires au droit naturel et au droit international public."⁴

Comme on peut en juger par ces quelques extraits, la jurisprudence belge a veillé dans la solution des rares litiges qui lui ont été soumis à appliquer avec une très grande rigueur les règles précises que la Convention de La Haye avait entendu imposer à l'occupant.

Au surplus, répétons le, les Cours et Tribunaux belges n'ont eu que rarement l'occasion de trancher semblables litiges. Pendant la durée de l'occupation, les ordonnances allemandes furent exclusivement appliquées par des tribunaux militaires allemands. Au lendemain de la libération du territoire, la plupart des litiges que l'application des ordonnances allemandes aurait pu susciter furent écartés par l'effet de deux dispositions législatives édictées par le Gouvernement belge de Londres en date du 10 janvier 1941 (*Monit. B.* 25 févr. 1941). Ces deux Arrêté-Lois s'inspirent également de l'esprit de la Convention de La Haye en ce sens que le premier dispose que les ordonnances de l'occupant, prises dans les

³ Dans le même sens, Voy : *Appel Liège*, 19 nov. 1945, *Pas.* 1946-II-43; *Comm. Bruxelles*, 9 avril 1945, *J.T.* 1945, 303; *Comm. Bruxelles*, 6 sept. 1945, *Pas.* 1946-III-4.

⁴ *J.P. Ixelles* 28 déc. 1944. *J.T.* 1945, 187; Dans le même sens, Voy : *Cass.* 13 mars 1947, *J.T.* 1947, 261; *Trib. Luxembourg* 31 juillet 1946, *J.T.* 1947, 108; *J.P. Bruxelles* 14 mars 1945, *J.T.* 1945, 277; *J.P. Bruxelles* 14 fevr. 1945, *J.T.* 1945, 304; *J.P. Ixelles* 26 mars 1945, *J.T.* 1945, 292.

limites de son pouvoir de fait, sont "abrogées de plein droit au fur et à mesure de la libération du territoire" tandis que le second précise que les mesures prises par l'occupant en violation de la Convention de La Haye, spécialement celles qui ont porté atteinte à la propriété privée, sont nulles et sont sensées n'avoir jamais existé. L'exposé des motifs d'un de ces Arrêtés-Lois du 10 janvier 1941, citant un arrêt de la Cour de Cassation du 20 mai 1916, rappelle à ce propos que: "la souveraineté belge émanée de la Nation n'est pas, par le fait de l'occupation du territoire par les armées allemandes, passée au Chef de ces armées, la force ne créant pas le droit."

Quant aux dommages causés aux personnes et aux biens par l'autorité allemande, agissant soit dans l'exercice des pouvoirs que lui reconnaissait la Convention de La Haye, soit en dehors de l'exercice de ces pouvoirs, ils ne donnent pas lieu, de plein droit, à réparation à charge de l'Etat belge. Ils sont considérés comme dommages de guerre et ne pourront recevoir réparation que le jour où le Parlement aura adopté une loi d'ensemble sur cette matière.

* * *

L'exposé qui précède et que nous avons cependant tenté de simplifier à l'extrême, a pu paraître confus au lecteur non initié. Cette confusion s'explique en raison du caractère même de la situation que la Belgique a connue au cours de la seconde guerre mondiale. La Belgique a malheureusement l'expérience de l'occupation et c'est en s'inspirant de cette expérience que le système que nous avons décrit a été adopté. En bref, on aura pu constater que ce système est légal plus que jurisprudentiel. C'est le législateur plus que le juge qui a été appelé à régler le sort de la législation de guerre et de ses conséquences. A l'expérience, ce système s'est révélé efficace en ce sens qu'il a permis d'éviter les lenteurs et les contradictions qu'aurait fatalement entraînées le système jurisprudentiel. Un an après la libération du territoire, la législation de guerre, tant celle de l'Allemagne que celle des Secrétaires Généraux, n'était plus pour les Belges qu'un mauvais souvenir. Cet heureux résultat, la Belgique le doit à un Gouvernement énergique et perspicace.

THE DUTCH GOVERNMENT'S TREATMENT OF THE DECREES MADE BY THE GERMAN AUTHORITIES DURING THE OCCUPATION OF THE NETHERLANDS

[Contributed by MR. K. JANSMA, Advocate at Amsterdam.]

DURING the occupation of the Netherlands the German authorities issued a considerable number of decrees which they enforced on the Dutch population. In a judgment delivered on January 12, 1942, the Netherlands Supreme Court declared that the Dutch Courts had no power to decide whether these decrees were in accordance with the Hague Convention IV of 1907 (*Ned. Jurispr.* 1942, nr. 271).

Before the liberation the Dutch Government, at the time still resident in London, issued a Royal Decree, dated September 17, 1944, nr. E 93, concerning the aforesaid German legislation. The German decrees were divided into three categories. Those belonging to Category A were deemed never to have been in force. Those belonging to Category B were to be declared null and void in the liberated territory as from the moment when this was evacuated by the enemy. Those belonging to Category C were to remain in force provisionally, which means of course that the greater part are still on the Statute Book and will probably remain there for a long time to come. These C-decrees which the Netherlands Government have taken over, relate for the greater part to the normal life of the country, in contradistinction to the A- and B-decrees which were connected with the purpose of the occupation.

There was some doubt whether the fact that a German regulation appeared

on list B indicated that it was to be considered as valid up to the moment of liberation, but two judgments of the Supreme Court of April 9, 1946 (*N./J.* 1946, nr. 326) and April 18, 1947 (*N./J.* 1947, nr. 380), seem to have definitely answered this question in the affirmative, although the Supreme War Crimes Court (*Bijzonder Hof van Cassatie*) ruled on January 20, 1947, that the Dutch Court had to decide whether this legislation was in conformity with the Law of Nations or not.

On September 17, 1944, a second very important Royal Decree (nr. E 100) was issued by the Netherlands Government, which contained rules for the restitution of property, etc. A special Court of Restitution (*Raad voor het Rechtsherstel*) was set up at The Hague with divisions all over the country. Very exceptional powers were given to this Court. The main provision of the Decree is Article 23x, which provides:

"the Court has power to annul wholly or partly any legal relations entered into or modified during the enemy occupation of the Netherlands, to modify them or, if they should be indefinite, to define them, provided

(a) that the legal relations exist between persons, of whom at least one is resident in the Netherlands, or the legal relations have regard to a thing or a right situated in the Netherlands, and also

(b) that, in the opinion of the Court, it would be unreasonable in the special circumstances of the case not to exercise such powers."

The main object of this very important measure is to grant restitution to Jews, etc., who have been deprived of their property by the Germans, to negative the effects of the German legislation on the property of their enemies, and in general to grant relief to all those who have suffered from harsh German legislation or other measures resulting in the passing of their property into other hands.

One of the simplest cases is that of a man who has bought real property which the Germans had taken away from a Jew. Irrespective of the question whether the new owner has bought directly from the Germans or from a third person, he has to surrender this property at the request of the former Jewish owner, and in doing so he is not entitled to any compensation, apart, possibly, from third persons through whose hands the property passed or to whom the price went. In principle he is entitled to prove his *bona fides*, and if he could do so, the application by the Jew could be refused or compensation granted. But so far nobody has yet been able to establish his *bona fides*, the Court of Restitution arguing that anybody acquiring real property during the occupation could easily ascertain in the public registers whether or not he is buying former Jewish property, and that, if he omits this precaution, he does so at his own risk. Similarly, if the property when restored to the Jewish owner has in the interval been incumbered by a mortgage, he can demand its cancellation. A person who is ordered to make restitution to a Jew is subrogated to a claim against the German Bank into which the money of which the Jew was deprived, was paid, and it is expected that in due course a not inconsiderable dividend will be paid by this Bank.

When during the occupation and because of German regulations a debtor has been obliged to pay the debt not to his real creditor but to somebody else, this payment is in general considered valid (article 33).

In order to grant restitution to those who have been deprived of their securities by German measures, an elaborate system has been created, under which practically all securities have to be surrendered to a Government office for registration. Securities not so surrendered will in due course be declared null and void. In this way it becomes possible to trace all securities without exception and to undo the wrong done by enemy hands.

Whilst the fate of immovable property to which the Decree E 100 applies, is in general free from doubt, there is much more uncertainty with regard to securities and other movables. The general rule of Dutch law is that a person

who in good faith acquires movable property, has a definite title unless the goods in question have been lost or stolen, in which case the former owner can reclaim them within three years. Apart from this, the Decree E 100 has created an elaborate system for the compulsory registration of securities, compelling every owner of a security to prove his title before a certain date, failing which the original security becomes void and the title to a new security passes to the State. It is generally assumed, however, that a person who is able to prove that he acquired a security during the occupation on the Stock Exchange in good faith and in the ordinary way of business will be protected. In case a security is claimed by more than one party, the Court of Restitution mentioned above decides between them.

The system of registration not only aims at the restitution of securities to owners which have been unlawfully confiscated, but also at carrying out the rule that all property of Germans passes to the State, and it also serves the purposes of revenue and of the control of foreign exchange.

The Court of Restitution can not only set aside contracts, but also wills, marriage settlements, and even judgments of ordinary Courts, if the above-mentioned conditions apply. It can also extend periods of prescription, etc. Claims under the Royal Decree E 100 have to be entered at the Court of Restitution before December 31, 1947.

During the occupation the ordinary Courts of Justice continued their business, although judgments were no longer given "in the name of the Queen" but "in the name of the Law." The Supreme Court gave the much criticised judgment, referred to above, that the Dutch Courts had no power to decide whether a regulation issued by the Germans was in conformity with the Law of Nations (judgment of Jan. 12, 1942, *N.J.* 1942, nr. 271). The lower Courts were sometimes very courageous; for example, the Amsterdam Court of Justice ruled that an English debtor could not be sued in Holland if payment of the debt would violate the British Trading with the Enemy Act (judgment of April 25, 1941, *N.J.* 1941, nr. 648, pronounced by President Dr. J. C. de Vries). The Germans tried in vain to prevent the publication of this decision, but took no further measures or retaliation.

It will be understood that the purpose of these remarks is not to give an exhaustive survey of the subject but merely to give some idea of the way in which these problems are being dealt with in Holland.

NOTES

Sir John Peden.—It is proposed to establish a prize for graduates in law of the University of Sydney in memory of the late Sir John Peden, K.C.M.G. For many years he was a distinguished Professor of Law in that University and afterwards President of the Legislative Council. Sir John was a valued member of the Council of this Society and always a ready adviser in its activities.

Dinner to Lord Macmillan.—The Committee decided with much regret that under the present circumstances the proposed dinner to Lord Macmillan must be postponed.

Allied Conferences during 1943 to 1945.—It may be useful to put on record certain documents relating to two conferences between the American, U.S.S.R. and United Kingdom Governments during the years 1943 to 1945. We may mention

(a) the *Military Conclusions of the Tehran Conference* of December 1, 1943—Cmd. 7092—which refer to Yugoslavia, Turkey, the future Allied landings in Europe, and future contact between the military staffs of the three Allies mentioned;

(b) the *Protocol of the Proceedings of the Crimea Conference* held at Yalta, on February 11, 1945—Cmd. 7088—which deals with

(i) World Organization, including the Dumbarton Oaks "Proposal for the Establishment of a General International Organization," and the addition of a new clause inserting what is popularly called "the veto" in the provisions governing the voting on the Security Council;

(ii) a Declaration on Liberated Europe, stating the principles to be followed

in restoring freedom and democratic government in the countries being liberated from the occupation or domination of the Axis Powers;

(iii) the Dismemberment of Germany;

(iv) a French Zone of Occupation and French Membership of the Allied Control Commission for Germany;

(v) the principles governing Reparation by Germany;

(vi) Major War Criminals;

(vii) to (xii) Arrangement regarding Poland, Yugoslavia, Persia and other countries;

(xiv) the revision of the Montreux Convention relating to the Straits.

The Legal Status of Germany.—The following are some of the sources, which, amongst others, it would be necessary to examine in attempting to assess the present legal status of Germany and the legal character of the present powers being exercised by the four Allied Governments now controlling that country:

(a) the *Declaration of June 5, 1945, on the Unconditional Surrender of Germany* (Cmd. 6648), whereby they assumed "supreme authority with respect to Germany";

(b) the *Protocol of the Proceedings of the Berlin Conference of August 2, 1945*—Cmd. 7087—dealing with the following matters

(i) the Establishment of a Council of Foreign Ministers;

(ii) the Treatment of Germany in the Initial Control Period;

(iii) Reparations from Germany;

(iv) the Disposal of the Germany Navy and merchant marine;

(v) Königsberg;

(vi) War Criminals;

(vii) and (viii) Austria and Poland;

(ix) Conclusion of Peace Treaties with Italy, Bulgaria, Finland, Hungary and Roumania, and the general question of the admission of non-Allied States to the United Nations;

(x) to (xx) Territorial Trusteeship and many other matters;

(b), (c) and (d) three Statements of the same date made by the four Allied Governments regarding control machinery, zones of occupation and assumption of supreme authority, all published in *Supplement No. 1* of the *Official Gazette* of the Control Council for Germany;

(e) the *Official Gazettes* of the Control Council, and, in particular, the first number and Supplement No. 1;

(f) *Rex v. Bottrill, ex parte Keuchenmeister* [1947] 1 K.B. 41, containing a Foreign Office Certificate of April 2, 1946;

(g) Agreement between the Swiss Government and the American, French and United Kingdom Governments (Cmd. 6884) referred to below;

(h) certain expressions contained in the judgment of the Nuremberg International Military Tribunal of September 30, 1946 (Cmd. 6964 at p. 38).

Peace Treaties.—The Treaties of Peace with Italy, Roumania, Bulgaria, Hungary and Finland have now been published (Cmd. 7022, price 2s. 6d.), together with an Official Commentary (Cmd. 7026, price 6d.) and amending slip for insertion, and are now in force.

German Assets in Switzerland.—The demand made by the American, French and United Kingdom Governments upon the Swiss Government for the surrender of certain German assets, public and private, transferred to Switzerland during the war raised certain questions of international law of fundamental importance. The published documents comprise the British Command Paper 6884 entitled "Agreement concerning the Liquidation of German Property in Switzerland" and a Swiss "Message du Conseil fédéral à l'Assemblée," numbered 5047 and dated June 14, 1946. The principal question of law raised was that of the rights of the three Allied Governments in regard to Germany and German nationals and assets by virtue of the terms of the Declaration of Unconditional Surrender of June 5, 1945 (Cmd. 6648), fortified by Law No. 5 enacted by the Control Council for Germany on October 30, 1945, and published in *Official Gazette*, No. 2, of November 30, 1945. The question whether the Allied Governments had thereby acquired legislative or executive power over German assets in a neutral country cannot be said to have received a decisive answer in relation to this incident, because the Swiss Government

declined to accept the legal basis of the claim made upon it, and the Agreement is in the nature of a compromise. It was reported that at one stage of the discussions the Swiss Government offered to refer the questions at issue to settlement by the International Court of Justice or to international arbitration, but this offer was not accepted. Somewhat similar questions arose between certain of the Allied Governments and Sweden, and an agreement was reached. A British Command Paper is on the point of being published. Note also the "Inter-Allied Declaration of January 5, 1943, against Acts of Dispossession committed in Territories under Enemy Occupation or Control": Cmd. 6418.

"Provocation" in the law of Tanganyika.—The history of the law of "provocation" in the criminal law of Tanganyika Territory makes an interesting study, showing as it does variations which correspond with the changes of rule experienced by the country. Generally speaking, it appears that "reasonableness" has been the governing factor in deciding the meaning of the term and, with the exception of a short period when the criminal law of Tanganyika seems to have approximated to the law of England in this respect, a more liberal interpretation has been accorded than obtains in the home-country.

Prior to the advent of the white man, the country was governed by its own tribal authorities, before whose somewhat primitive Courts offenders were brought for judgment. It must be appreciated that there was great variation in the composition of these tribunals, but they generally consisted of the Chief and a number of Elders, who pronounced their judgment in accordance with the customary law of the area. The Elders themselves were not regarded in the light of a jury, but were persons who, by reason of their status, their age, or for other causes, appeared as the personification of popular thought. The Courts themselves dealt with matters of both criminal and civil nature, though the clear differentiation between these branches of law which exists in more civilized countries was not observed. In matters of homicide, the greater number of the tribal Courts seem to have viewed all but the most deliberate murder as a matter for compensation, and it is found therefore that a small degree of provocation permitted of payment of blood-money by the offender or his clan; the death penalty was thus usually avoided. In some tribes a custom similar to the ancient use of "deodands" obtained, frequently the weapon itself being formally destroyed by the tribal authorities. Deliberate murder, where provocation was deemed insufficient or non-existent, was, in some tribes, punished by death—the form of execution varying according to the tribal custom of the area concerned. In the Nyamwezi country, the death penalty seems to have been imposed only if the offender had insufficient means to pay the compensation adjudged by the tribal Court—all cases of homicide being, in the first place, compoundable. Investigation makes it appear that the death penalty was extremely rarely inflicted in most tribal areas, giving rise to the surmise that "provocation" was a term liberally interpreted in the majority of the unwritten tribal laws of the country.

The earliest record of an attempt to formulate a principle governing the law of "provocation" in the Territory is found in the Criminal Code of the German Empire—originally "The Criminal Code of the North German Federation"—which was applied to German East Africa in common with other countries of the German Empire. The Code itself is dated May 31, 1870, and s. 213 of it (as translated) reads:—

"213. If the homicide has been roused to anger by unprovoked ill-treatment offered by the deceased to himself or to a relative or by unprovoked gross insult on the part of the deceased and is thereupon carried away by passion forthwith to commit the deed, or if there are other extenuating circumstances confinement of not less than six months may be imposed."

The scope of the section appears to be wide and to admit of mere words being sufficient for the plea of "provocation"; unfortunately no decisions are available in local German Court records of the period, on the interpretation of the section.

After the period of hostilities, consequent on the war of 1914–1918, during which martial law was proclaimed throughout the Territory, the Application of Laws Ordinance, 1920, provided for the enforcement of the Indian Penal Code for the purposes of criminal justice; the Indian Act as applied was amended in some particulars by the Punishment of Murder Ordinance of the following year, but the

provisions of the Act obtained in so far as the law of "provocation" was concerned. It is not necessary to discuss the view taken by the Indian legislation concerning "provocation," for the very full interpretations of the section concerned are well known. It will, however, be remembered that its provisions are considerably wider than those of English law and that words themselves may constitute provocation sufficient to reduce murder to the lesser crime.

In 1930, however, the application of the Indian Act was repealed by s. 2 of the Tanganyika Penal Code of that year, and the Territory, for the first time, acquired its own Code of Criminal Law. By s. 4 of the new Code, interpretation was to be "in accordance with the principles of legal interpretation obtaining in England." S. 191 of the Code reduces the punishment for homicide done "in the heat of passion caused by sudden provocation before there is time for his passion to cool"; the subsequent section defines the term "provocation." In the main, interpretation appears to be similar to that of English criminal law, it having been held that words or gestures, as a general rule, are not sufficient to constitute provocation to reduce murder to manslaughter. (*R. v. Toya Mamure*. 14 K.L. R.145.) A parallel decision in the Tanganyika High Court in *R. v. Maganga Mgopi* (3 T.T.L.R.15) held that "although the term 'insult' is used in defining 'provocation' in s. 192 of the Penal Code, that section cannot be taken to intend that mere words of abuse in regard to the accused are sufficient to reduce the crime of murder to one of manslaughter, where the murder is by means of a deadly weapon."

These rulings appear to be on all-fours with English law, in which numerous decisions make it clear that, as a general rule, no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce murder to manslaughter.

In 1936, the Penal Code (Amendment) Ordinance once again altered the law concerning provocation—the interpretation of the expression "provocation" being somewhat widened. Until the date of the amendment, provocation included any wrongful act or insult which, when done to an ordinary man, would be of such nature as to be likely to deprive him of the power of self-control. The amended section included the words:—

"For the purposes of this section, the expression 'an ordinary man' shall mean an ordinary person of the community to which the accused belongs."

This interpretation opened the way for pleas of manslaughter in cases of homicide where mere words or gestures would be sufficient to constitute provocation among the class of which the accused person was a member. Thus, certain opprobrious expressions used to a Mohamedan female, or certain acts or gestures which might be regarded as outrageous to tribal custom, became admissible as provocation; on proof of the seriousness of the act or words, the Court might therefore reduce the offence to one of manslaughter.

In this connection, the use of assessors has proved of considerable assistance to the Court. Such assessors are normally Elders of the same tribe to which the accused belongs and are thus able to advise the Court as to the seriousness or otherwise of the words or acts complained of by the accused as giving rise to the provocation pleaded.

As a result of a decision in the Court of Criminal Appeal for Eastern Africa (*Mushubi s/o Muhinguzi v. Rex*; Criminal Appeal No. 63 of 1946) it was held that, if an ordinary person would have been induced by the provocation to commit even a mild assault, this must reduce the crime to manslaughter, notwithstanding that the assault committed may have been of a savage and brutal description and out of all proportion to the nature of the provocation offered. This ruling was expressed by the Court of Appeal in the following terms:—

"Provocation which under English law might for this branch of the law excuse only a slap with the open hand, in East Africa excuses a fatal attack with a lethal weapon to the extent of reducing the fatal attack to manslaughter, however savage, brutal, and unbridled such attack may be."

The Penal Code (Amendment) Ordinance, 1946, is designed to clarify the meaning of the term "provocation" for the purpose of reducing the crime of murder to manslaughter and of giving effect to a more natural interpretation applicable to local conditions.

Conscientious Objectors in Foreign Countries.—In the absence of further comment, the statements of Mr. Robert S. W. Pollard in his interesting article "Conscientious Objectors in Great Britain and the Dominions"¹ that "Conscientious objectors were unknown to law in Europe" (p. 72) and "... the English-speaking countries—for the U.S.A. also made provision for C.O.s—exempted from the compulsion to use arms those persons who believed it to be contrary to their consciences" may be thought to suggest that there is no legal provision for C.O.s outside the English-speaking world.

Schemes of alternative service, somewhat on the British model, have long been provided for by the conscription laws of Holland, Norway, Sweden, Denmark and Finland. By the Swedish law of March, 1943, conscientious objectors are required to do civilian service as firemen, or to join the armed forces in a non-combatant capacity. As in Britain, many C.O.s refused to perform non-combatant military duties other than those of a medical nature, and these were later given forestry work under civilian control. During the war years nearly 11,000 Swedes refused to bear arms. In Finland during both wars (1939-1940 and 1941-1945) the legal provisions concerning C.O.s were administered by the military, with a resulting lack of uniformity of treatment. In Denmark during the first three years of the German occupation conscription for the Danish army was maintained on a peace-time basis, and each year some 200 men applied for exemption as conscientious objectors. The majority of these were never called up, and the others were required to do forestry or hospital work as alternative service. Conscientious objection to military service was also recognized by law in Russia after 1918, but the provisions were withdrawn in 1939 on the ground that no applications for exemption had been received during 1937 and 1938. It might even be claimed that Roumanian law "provided" for the C.O., for a decree issued in the summer of 1943 made persons "refusing military service on religious or other grounds" liable to the death penalty. At least some administrative provisions seem to have been made for dealing with C.O.s in Germany, for the German C.O.s found in Buchenwald and other concentration camps were distinguished from other inmates by the coloured patches on their clothing. Leaving Europe, in Brazil a regulation made under Decree 8,981 of March 12, 1942 (introducing compulsory military service) imposes a tax on persons exempt from military service, and the exempted classes include "persons with conflicting religious beliefs." In Uruguay, exemption is not confined to religious objectors, for "objections based on the philosophical conceptions of a citizen whose conscience forbids him the use of arms" are required to be entered on the registration cards of such citizens when called to Army or Navy recruiting centres.

E. L. JOHNSON.

Legislation in St. Lucia.—The history of the law of St. Lucia is similar in many respects to that of Lower Canada, also formerly under French rule. British rule commences with a Proclamation of 1803 by the Commanders of the victorious forces "assurant l'ancien droit." The Proclamation was included in the 1889 Edition of the laws and now appears in Appendix B to the 1916 Revision, page 1068—"Leurs Excellences leur assurent pleine et entière jouissance de toutes leurs propriétés sous les lois qui existaient dans la colonie à l'époque immédiatement antérieure à la dernière cession." The ancient law of St. Lucia is accordingly regulated by the Arrêt en Règlement du Conseil Supérieur portant que la Coutume de Paris et les Ordonnances du Roi seront suivies en cette Ile dated 1681. This enactment is reprinted at page 1063 of the 1916 Revision.

Owing to the uncertainty existing with respect to the law relating to many civil matters, the Civil Code Ordinance, 1876, was passed to enable the consolidation and amendment of the civil law. The result was the Civil Code of Saint Lucia and the Code of Civil Procedure which came into force on October 20, 1879. The Code is based on the Civil Code of the Province of Quebec and the commentaries, text-books and Law Reports applicable to the latter are frequently referred to on a construction of the St. Lucia Code. Article 2485 of the Code provides—"The laws in force at the time of the coming into force of this code are abrogated in all cases:

In which there is provision herein having that effect expressly or by implication;

In which such laws are contrary to or inconsistent with any provision herein contained;

¹ *Journal*, xxviii, p. 72.

In which express provision is herein made upon the particular matter to which such laws relate."

There is a saving as regards transactions anterior to the coming into force of the Code.

A similar section in the Code of Civil Procedure, Article 1087, deals with procedural matters.

The Civil Code deals with such matters as civil status, marriage, minors, succession, sale, loans, crop advances and certain commercial matters.

As to the application of ancient French law a reference to *Symes v. Cuvillier*, 1880, 5 App. Cas. 138, proves useful. The Commercial Law of St. Lucia is generally English and the Law of Property and Civil Rights French.

The year 1916 again saw a spate of codification with the Commercial Code, the 1916 Revised Ordinances and the Revised Rules and Orders coming into force. So far legislation apart from the civil law had been progressing mainly on English lines. It was found, however, that the Civil Code contained provisions relating to goods and merchandise which were not always in harmony with English law. Quoting from the preface to the Commercial Code:—

"The contents consist mainly of a transcription or abridgment of the principal English commercial statutes; except that, as regards Companies, Bankruptcy, Patents, and Trade Marks, owing to the almost entire lack of corresponding machinery, the procedure has to a considerable extent been left in the discretion of the tribunal. It is believed that any uncertainty which might arise from abridgment will be obviated by the governing provision that except as otherwise expressly provided by this Code or by any other law, in matters commercial and maritime, the law for the time being in force in England shall continue, as heretofore, to be the law of the Colony."

The Commercial Code embodies the law relating to Traders, Partnerships, Companies, Mercantile Agents, Sale of Goods, Bills of Exchange, Insurance, Bankruptcy, and Patents, Designs and Trade Marks.

The object of all this codification was to separate as far as possible Civil, Criminal and Commercial Law and as stated in the preface to the Revised Ordinances of St. Lucia, 1916, to collect "the uncodified mass of departmental and general Ordinances . . . with their appropriate regulations" under a head of Administrative Law. The Ordinances were grouped in the two volumes of the 1916 Revision under Titles, namely:—

Administration of Justice, Agriculture, Animals, Dangerous Substances, Defence and Local Forces, Ecclesiastical Corporations, Education, Emigration and Immigration, Friendly Societies, Harbour and Shipping, Labour, Lands, Law (Miscellaneous), Loans (General), (Inscribed Stock) and (Government Advances), Medical Aid and Poor Relief, Police and Prisons, Post Office, Public Health, Public Library, Public Officers, Public Works, Quarantine, Regulation and Control, Revenue (Customs and Excise), Revenue (Miscellaneous), Status and Naturalisation, Telegraphic, Town of Castries, Towns and Villages.

The Revised Edition of Laws Ordinance enabling the revision specifically exempted by s. 7 (3) certain laws from the scope of the revision. Some of these are contained in an Appendix to the 2nd Volume.

The all-embracing revision contemplated in 1916 has to this day not been completed, as the proposed revised edition of the Civil Code and Code of Civil Procedure was postponed.

The Revised Rules and Orders, 1916, were published as a companion volume to the Ordinances. The Criminal Code, promised "in the autumn," was not, however, published till 1920, when it was produced by that indefatigable compiler the late J. E. M. Salmon, under the authority of the Criminal Law and Procedure Ordinance, 1918. The same compiler has since provided a guide through the maze of legislation passed after 1916, the latest edition of which is the St. Lucia Law Finder, 1944. The Criminal Code embodies in the main, principles of English law but excludes the operation of the Common Law and provides certain savings in respect of other laws—sections 1410 and 1411 Criminal Code.

Since 1917 the laws of St. Lucia have been published each year in separate volumes. It would be futile here to attempt to examine in detail the scope of these laws. They have repealed, amended, replaced or substituted many of the provisions of the Codes and the revised enactments, whilst also they have covered ground not yet broken. During the war years War legislation helped to make

these volumes quite formidable in size, and the need for a further revision is again being felt.

This review would not be complete without some reference to Imperial Acts affecting St. Lucia. A Table of these Acts to 1916 is contained in Appendix C to the 1916 Revision, page 1069. Subsequent Acts and Orders in Council are published yearly with the laws of St. Lucia for the appropriate year. The Law Finder of 1944 is an indispensable index not only to the Codes and amendments thereto but to all the laws affecting St. Lucia to January 1, 1944. It is hoped that a revised edition will soon be available.

KEITH ALLEYNE.

NOTICES OF BOOKS

INCOME TAX CASE LAW

A TREATISE on Income Tax Law¹ which has the august distinction of a laudatory foreword by Viscount Simon, who has been both Lord Chancellor and Chancellor of the Exchequer, would seem to stand in little need of further commendation. But it may be useful to indicate the nature of the contents of this rather unusual book to which its title scarcely does justice. It is not merely an annotated digest of cases. What Mr. Farnsworth has done is to select several of the most controversial and difficult topics of Income Tax Law and to write an excursus on each of them in which the judicial decisions which have elucidated or sometimes obscured them are submitted to critical analysis.

A good example of his method will be found in his treatment of the dividing line between questions of fact and questions of law on which the right of appeal to the courts depends. It cannot be said that judicial endeavours to provide a satisfactory criterion have been very successful. Lord Justice Scrutton, in a moment of blunt candour, once cynically suggested that when a court wished to reverse the judgment below it contrived to find the question to be one of law, while if it was disposed to affirm the decision below it found the question to be one of fact. Sometimes a refuge is sought by holding the question to be one of mixed fact and law. On this subject as on others the author renders useful service by citing and discussing the views of the American courts, whose decisions do not always follow the same lines as ours.

Mr. Farnsworth has an established reputation as an authority on the law relating to the Residence and Domicil of Corporations, on which he has written an erudite treatise, and in the present work he deals with that branch of law as affecting Income Tax. Other topics treated include Double Taxation of Foreign Dividends, Annuities paid free of Income Tax, and Capitalised Interest. He seems to have a relish for the most difficult points of Income Tax law, and the courage and occasionally the originality with which he tackles them are admirable.

This is a book for the connoisseur who has acquired a taste for highly technical problems to be solved by pure dialectic, unembarrassed by any regard to merits. Anyone who in future has to advise, argue or adjudicate on any of the matters with which Mr. Farnsworth deals will find in him a most valuable guide.

M.

THE COLLECTED PAPERS OF JOHN BASSETT MOORE

THESE seven volumes² constitute a fitting tribute to the remarkable career and widespread influence of this great doyen of international lawyers. Born in 1860 and entering the State Department as a law clerk, being already admitted to the bar, he has during nearly half a century devoted his gifts and amazing energy to the development of international law in various capacities—as adviser to his Government, as author, as Professor, as negotiator, administrator and arbitrator and as Judge of the Permanent Court of International Justice—in addition to finding time for many other public and private activities. His *Digest*, now followed by Judge Hackworth's *Digest*, has for many years been an indispensable piece of apparatus for all international lawyers and would alone have laid them under a permanent debt to him.

The volumes contain, we may surmise, practically all that Dr. Moore has written for publication which has not appeared in book form, though one substantial section, *International Law and Some Current Illusions*, was published in 1924. The

¹ *Income Tax Case Law*. By A. Farnsworth, Ph.D., LL.M. (London: Stevens & Sons, Ltd., 1947.) Pp. xxiii + 176. Price 17s. 6d.

² *The Collected Papers of John Bassett Moore*. 7 volumes. (Yale University Press: Geoffrey Cumberlege, 1944.) £6 13s. 6d. \$20.00.

contents relate to both public and private international law, history, diplomacy and international relations, and some lighter topics. It is difficult for a reviewer to know where to begin. Apart from the main field of public international law to which most of the items belong, we may take as illustrations the Enforcement of Usurious Foreign Contracts, and Polygamous Marriages: estimates of, or tributes to, Abraham Lincoln, John Marshall, Joseph Story and Elihu Root: the Monroe Doctrine, Pan-American unity, the Principles of American Diplomacy.

Dr. Johnson remarked that "lawyers know life practically," meaning, no doubt, practising lawyers, and the distinguishing feature of the contents of these volumes is the hand of the practical lawyer rather than that of the academic lawyer. So much is that so that some of the output of the later years—during and after the first "world war" (an emotional expression which irritated Dr. Moore)—is realistic to the point of being cynical.

Out of the large store of legal material contained in these volumes, we may mention one topic of which Dr. Moore could truly say *quorum pars magna fui*, and that is the contribution of American lawyers to international arbitration and judicial settlement, which was one of his first and latest interests. Volume I contains a twenty-page report on the part played by the United States in international arbitration from the Jay Treaty of 1794 up to 1891: Volume 2 contains 60 pages upon arbitration and, in particular, upon the advantages of a permanent system of arbitration: Volume 5 contains two addresses on the Permanent Court of International Justice and a Report on the question of Advisory opinions: Volume 6 contains more than 60 pages on arbitration and the Permanent Court, including the question of the Optional Clause: Volume 7 also contains relevant matter.

The miscellaneous character of the contents must not be allowed to obscure the inclusion of much "hard law," of which the international lawyer, both practising and academic, should be aware; for instance, "Maritime Law in the war with Spain" in 1905, an "Opinion on the Legal Position of the United States Branches of Foreign Insurance Companies" in 1917, the "Beneficial Ownership of Property as Affecting its Nationality" in 1921, the Case of the Standard Oil Company before the Mixed Arbitral Tribunal in 1921.

There can be no doubt that few international lawyers have received, and effectively taken, so many opportunities of promoting the arbitral and judicial settlement of international disputes as Dr. Moore. We are grateful to the Trustees of the John Bassett Moore Fund (Professor Borchard, Professor Joseph P. Chamberlain and Dr. Stephen Duggan) for the completion, by the publication of these seven volumes, of the written and spoken record of Dr. Moore's work.

A. D. McN.

THE CONSTITUTION OF NORTHERN IRELAND

SIR ARTHUR QUEKETT died on October 2, 1945, and this is his last work³ published after his death. It might therefore be expected that this review would begin with an account of his career and of his many remarkable qualities. This, however, is set forth in a foreword to the present volume by Sir Cecil Carr with so much insight and such felicity of expression that any attempt to supplement or embellish what he has written would be worthless and foolish. A fellow draftsman, who often toiled with Quekett in the same field, may perhaps add this, that to him it seemed that Quekett's outstanding qualities were patience and tolerance. Every draftsman must have these qualities, but with Quekett they were gifts rather than virtues.

The last fifty pages of this volume are avowedly a supplement to Parts I and II of the same work. In truth, the whole volume is of the nature of a supplement. It consists of a series of essays on a number of disconnected subjects which have come to the fore since Part II was written or which were not treated in the earlier Parts so fully as Quekett wished.

To the student of constitutional law Chapter I is perhaps of greater importance. It deals with "the constitution in Time of War" and describes very fully and clearly the methods adopted by the two governments to solve the difficulties arising from the reservation to the Imperial Parliament of "matters arising from a state of war" and the "defence of the realm." This reservation meant that the Imperial Government was primarily responsible for the administration in Northern Ireland

³ *The Constitution of Northern Ireland*. By Sir Arthur S. Quekett, K.C., LL.D., with a foreword by Sir Cecil Carr, K.C.B., K.C., LL.D. Part III. A review of operations under the Government of Ireland Act, 1920. (Belfast: H.M. Stationery Office, 1946.) Pp. xxv, 259. 15s.

of food and clothes rationing and indeed the whole apparatus of licences, permits, coupons and certificates created by the Defence Regulations and the war-time legislation in general. To discharge these duties the Imperial Government had no machinery in Northern Ireland at all; the police, and (apart from a few revenue officials) the civil service, were not under their control. So the gap was bridged by an elaborate system of delegation, under which the responsible Minister in London delegated his powers to the corresponding Minister in Belfast, who exercised them through his civil servants. That, of course, raised a further difficulty. The Northern Irish Minister and civil servant had to serve two masters, the Imperial Parliament and the Northern Irish Parliament; how could that be done? Members of the Northern Irish Parliament, not unnaturally, wanted to discuss the policy on which their Ministers and civil servants were spending much of their time; but this policy was beyond their control. These difficulties were met by a ruling of the Speaker of the House of Commons of Northern Ireland that, while it was out of order to criticize the policy of the Imperial Government, it was in order to put down questions asking for information from Ministers acting as agents for Imperial Departments, and also to put down motions asking the Government of Northern Ireland to make representations to the Imperial Government on any particular matter arising out of war legislation. These arrangements seem to have worked satisfactorily; but it may be doubted whether they would have been practicable unless both Parliaments had been very much of the same mind.

In Chapter II Quekett reviews the cases in which the courts have considered the question whether legislation of the Parliament of Northern Ireland was *ultra vires*. It is remarkable that there have been so few of these—apparently no more than five in twenty-five years. Quekett thinks (rightly, it seems) that they lay down no new general principle as to the position of a Parliament with limited powers; but they are, of course, of great importance in determining the meaning of the words of limitation used in the Government of Ireland Act, 1920, particularly the words "take any property without compensation," which, as a result of a conflict between Lords and Commons were incongruously spatch-cocked into a clause dealing with religious equality.

Chapter III on "Statute Law" deals with a number of statutory technicalities. Chapter IV sets out and comments on the instruments relating to the office of Governor. Chapter V describes the procedure which has been adopted in Northern Ireland on a demise of the Crown; the author notes that this procedure implies acceptance of the view that the Northern Ireland legislature is not dissolved by the demise, but fuller treatment of this point would have been of interest. Chapter VI explains the alterations of the constitution of courts of summary jurisdiction which were brought about by the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, the effect being apparently that all important powers are now exercisable only by a "resident magistrate" (i.e., a stipendiary). Chapter VII deals with the civil service and Chapter VIII with administrative matters, including the redistribution of functions between the government departments. Chapter IX expounds the Northern Ireland (Miscellaneous Provisions) Act, 1945, unhappily the last piece of Imperial legislation with which Quekett was concerned.

So ends the last Part of a monumental work. For more than twenty years Quekett was regarded as an oracle by everyone concerned with Northern Irish constitutional questions, whether in Whitehall or at Stormont; and it is difficult to conceive the possibility of finding a satisfactory answer to such questions without his help. Fortunate it is for his successors that they can at least find the material on which to base an answer in the three volumes of which this is the last. They preserve for ever much of Quekett's immense store of learning.

J. A. STANTON.

CONSTITUTIONAL LAW

ALL who are interested in constitutional questions from either a professional or a lay point of view will welcome this new edition of a book⁴ which since its first publication fifteen years ago has won a leading place in the modern literature of the subject. Since the appearance of the second edition (1935, reprinted 1936) a large amount of new material, much of which has the greatest interest and

⁴ *Constitutional Law*. By E. C. S. Wade and G. Godfrey Phillips. Third Edition. (London: Longmans, Green & Co., 1946.) Pp. xxv + 474. 25s. net.

significance, has been accumulating, in the assessment and interpretation of which those who have come to rely on the expert guidance of Messrs. Wade and Phillips will welcome its renewal. It is a real service to constitutional studies that despite the manifold difficulties of the task, including those which have prevented one of the authors, engaged on national service, from giving his full time to it, they have managed so soon after the end of the war to produce a new edition which is up to date, thoroughly revised and fully adequate to present day needs.

On earlier occasions revision was possible without radical change. When the first edition was revised in 1933 so as to include a discussion of the Statute of Westminster, and the second edition enlarged so as to deal fully with matters raised by the Report of the Donoughmore Committee, all that was necessary could be done by insertion and re-arrangement. This time no such relatively easy course was open, and the authors decided on the formidable undertaking of re-writing practically the whole text. Every chapter, it might indeed be said, every page bears evidence of the vigilance and precision with which the work has been done. Constitutional development during the ten years since the last edition appeared is reflected in references to about seventy statutes and almost as many cases belonging to that period: in the fuller discussion of issues which have only lately emerged or assumed a new importance: in the particularly careful revision of the sections relating to the Empire, which now include mention of the Constitution of Eire, the attempted extension of Commonwealth powers in Australia, the procedure adopted by the Dominions in dealing with the abdication issue and with the declaration of war in 1939, Indian government from the Act of 1935 to the Wavell proposals, new constitutional arrangements in Jamaica and elsewhere, and much of similar interest.

One major problem of revision has very properly been postponed. The authors have judged it premature to attempt any general review of the constitutional effects of the war. War-time developments, it is true, are frequently referred to: emergency powers, compulsory service, war-time ministries, imperial co-operation, even the leasing of bases and the Anglo-American Caribbean Commission are all noticed. But the broader implications of the war for British constitutional development are not examined. As much of the work of revision was carried out before the close of the war, this decision to postpone was natural, but it can be defended on wider grounds. Meanwhile the authors go no further than to predict that such main principles as parliamentary supremacy, ministerial responsibility, and judicial independence will be found to have survived unchanged.

Whether the optimism of this forecast is or is not borne out when the results of war-time development can ultimately be assessed, it may perhaps be suggested that, apart altogether from what has occurred since 1939, tendencies have been at work in the constitution during our own time which arouse a degree of curiosity not wholly evident in the pages of this book. The point may be discussed with particular reference to two parts of the book which have been very completely revised—Part II, on General Principles, and Part VII, on Administrative Law.

Part II, in a greatly improved form which eliminates many of the difficulties previously encountered by students, presents, in conjunction with Part I, an admirable statement in modern terms of the great historic principles of the Constitution, which could hardly be put with more clarity and force than they are on pp. 55-6. To this statement, however, the contents of Part VII are related in a way which arouses some disquiet. It refers to a topic to which the authors have by degrees, and quite properly, come to attach increasing importance. In the first edition this was dealt with in two chapters in Parts respectively devoted to the Judiciary and to Local Government. In the second, these two chapters, grouped with three others which were new, made up a new Part, entitled *The Law of Public Administration*; the authors explaining that the term *Administrative Law* was somewhat suspect and, however appropriate, best avoided. In this new edition, however, the term is accepted. *Administrative Law* receives six chapters, covering 50 pages, a fullness of treatment accorded to no other topic save the Executive itself, which gets ten chapters extending over 70 pages. It may parenthetically be observed that the Judiciary, which got five chapters in the first edition, now receives only two.

No one would take issue with the authors for their recognition that an inverse expansion, in structure and function, of the Executive has become a conspicuous feature of our modern constitution. Excellent as their exposition is, however, it

hardly succeeds in conveying much of that critical attitude towards the "extended executive" which is certainly as evident—and is no less justified—in 1946 as it was ten years ago. Not, indeed, that the issue is avoided. Criticisms and suggested remedies are summarized fairly enough. Yet one cannot help feeling that positions taken up in Part II are in Part VII somewhat too readily abandoned. Thus, on pp. 298-9 the admissions (made, apparently, not without approval) that Parliament, aware of judicial methods of interpretation, has as a means of implementing social policy made over the determination of large numbers of individual cases to special tribunals, and that the peculiar merit of these tribunals is that they do not attempt to measure the effects of social legislation by using the traditional common law technique, surely go far to weaken the plea which immediately follows that jurisdiction ought not lightly to be given to special tribunals and that "so far as practicable" the new jurisdiction should embody the merits of the traditional system. It is not easy to see what force this plea can have when it has been conceded that the old jurisdiction ought generally to give way where considerations of social policy are alleged, and that the "centre of the traditional common law technique," so far from being thought of as one of its merits, is one of the chief points against it.

Nor, perhaps, is there much reassurance to be found in the authors' contention that the real safeguards against the abuse of delegated legislative powers are parliamentary and administrative. No doubt Parliament could define powers clearly and supervise their exercise closely. Yet the defects of parliamentary control are well-known, and parts of the authors' own statement make it seem that they may be incurable. No doubt, too, ministers ought to be vigilant in supervising the rule-making activity of their departments and of subordinate authorities, but whether this vigilance can really be reckoned a safeguard of constitutional liberty is at least doubtful.

And yet, if one occasionally feels that a more tenacious defence of principles would have been welcome, no account of this book can end on any other note than one of real appreciation. It is in many important respects a new book, and yet it is also the rightful successor to those earlier editions which by their comprehensiveness, balance, exactness and clarity have won a deserved pre-eminence. That pre-eminence is now renewed.

DAVID LINDSAY KEIR.

ROMAN LEGAL SCIENCE

SOME ten years ago, H. Kantorowicz and F. de Zulueta planned an *Oxford History of Legal Science*. Legal science, not law, was to form the subject of the work. A contributor, that is, was to concentrate not on the contents and working of a system of law—this side was to be taken as known—but on the nature of the legal art reflected in it, on the methods that were employed in its creation, application and exposition. As a parallel (inevitably faulty) one might think of a history of theology, philology or musical criticism as opposed to one of religion, language or music. The work was to consist of three parts, on ancient, medieval and modern systems. Some systems would be discussed twice, such as the Roman and Jewish, which were to come in both the ancient and the medieval parts. (The present reviewer was entrusted with Jewish Law, ancient and medieval.) On Kantorowicz's death in 1940, the plan was abandoned. Nevertheless, some of those charged with contributions completed their sections, free from the limitations as to space imposed by the original scheme. Thus G. M. Calhoun's *Introduction to Greek Legal Science* appeared in 1944, a disappointing book. On Mohammedan legal science, we expect soon to have a book from the masterly pen of J. Schacht. The present notice is devoted to F. Schulz's *History of Roman Legal Science*,⁵ covering the period that would have gone into the first part of the comprehensive work, from the XII Tables to Justinian.

Schulz, up to Hitler's advent holder of the main Chair of Roman Law at Berlin, needs no introduction: ever since his *Principles of Roman Law* appeared in an English translation (by Mrs. M. Wolff, 1936) he has been one of the best-known contemporary writers on Roman Law in this country. His new book, admirably translated by de Zulueta, adds to the debt we are owing him. He says that he intends it "neither as an educational manual nor as a work of

⁵ F. Schulz, *History of Roman Legal Science*. (Clarendon Press, Oxford, 1946.) 358 + xvi. 21s.

reference, but as a book to read." In point of fact, he has fully succeeded in making it all three things in one.

He treats his subject in four divisions: (1) the archaic age—from the XII Tables to the end of the Second Punic War; (2) the Hellenistic—from 200 B.C. to the end of the Republic; (3) the classical—the Principate, from Augustus to Diocletian; and (4) the bureaucratic—the Dominate, from Diocletian to Justinian's codification. Within each period, he considers four points: (1) the jurists, in particular their social origins; (2) structure and functions of the legal profession; (3) the tendencies dominating legal thinking; and (4) legal literature. Some readers may feel that the discussion of legal thinking is not full enough, while that of literature contains too much detail. Little is said about the interpretation of statutes; the influence of philosophy and rhetoric on the classics is underrated, with the result that important aspects of their work are left out of account; and the humanizing and Christian trends in the post-classical epoch are accorded two and a half pages only. On the other hand, questions of transmission are discussed at length. True, the exact way in which a treatise has come down to us does frequently throw light on Roman legal science: if we are to form a correct opinion of the Byzantine law schools, we must know, for example, how far they revised the classical texts. But a problem like the filiation of medieval manuscripts strikes one as less relevant.

The author is a very "advanced" critic. He admits that recent research and discoveries have disproved the theory, fashionable not so long ago, of a thorough Byzantine re-writing of classical law. But clinging to the assumption that the classics were capable neither of progress nor of inconsistency, he still believes in a thorough re-writing—only it was done by Western lawyers in the hundred years immediately following the classical age. That this conclusion necessarily follows if the premiss is granted was demonstrated by Buckland in *Juridical Review*, 1936, pp. 339ff. He, however, also pointed out the improbability of the premiss. In fact, some of Schulz's assertions rest on surprisingly flimsy evidence.

We are told that both Sabinus's *Ius Civile* and Gaius's *Institutes* were posthumous publications of imperfect lecture-notes. One reader at any rate is left unconvinced.

DAVID DAUBE.

CONTRACTS

ALTHOUGH this book⁶ is described as a second edition of an uncompleted work on Contract by Sir John Salmond, it is in fact to a large extent an original publication and merits notice as such.

Readers will perhaps remember that Salmond's text was first published in 1927 by Professor Winfield, who had need to make considerable additions of his own to produce a reasonably complete treatise but recorded Salmond's *ipsissima verba*. Professor Winfield found himself unable to spare the time required for a new edition; and, it being thought not desirable to intermeddle with the contributions of so distinguished a person during his lifetime, his additions have now been omitted. Accordingly the new editor has supplied anew the considerable lacunæ of Salmond's work. Moreover, he regarded himself (in this reviewer's opinion, quite rightly) as entitled to alter Salmond's text, more particularly as it was available in Professor Winfield's edition. These alterations are considerable but are not distinguished from the text. Two chapters (about 50 pp. in the first edition) of Salmond's work have also been omitted; and yet the new edition though much more closely printed is about 100 pp. longer than the first. Upon a rough estimate one third of the present volume is Professor Williams' work; and that proportion does not adequately represent his true part. For example, Salmond's text, which was originally very bare of annotations, now carries a considerable body of references which are due to the editor.

It is always a question whether a book merits as great an expense of editorial time and labour as has been made in this instance; and that question is particularly insistent in the case of an uncompleted work by Salmond. Salmond's treatise on contract gives the impression of having been his spare time occupation. It was of a quasi-jurisprudential character and greatly suffered from Salmond's

⁶ Salmond and Williams: *Principles of the Law of Contracts*. 2nd edition by James Williams, LL.M. (N.Z.), Ph.D. (Cantab.), Challis Professor of Law in the University of Sydney: (Sweet & Maxwell, London, 1945.) xxxvi + 640 pp. 35s.

facility in phrase-making—a facility which sometimes at least covered a reluctance or an inability to give to the matter in hand careful or accurate thought. The book, as left by Salmond, was scarcely more than the author's table-talk on contract. Yet it served a reasonable purpose. It was stimulating to a student who had some acquaintance with the existing law of contract to read the almost casual suggestions of a practised writer who had had judicial experience, especially if the student had the curiosity to analyse and criticize those suggestions. But Salmond's book remained one to be read rather than to be studied.

Professor Williams' book is a much more serious contribution to the study of the law of contract. It is not a book designed to be the student's first text-book in Contract; but it is a treatise which will be helpful and suggestive to a person who has some knowledge of the subject. It is unlikely that any one reviewer will find all parts of such a book equally satisfactory; and it is to be hoped that this reviewer, in confining himself to the earlier chapters which happen to seem to him less satisfactory, will not be construed as condemning the book. Indeed, it is much to be desired that books of this sort will be written in increasing numbers. For what Professor Williams has, with much success, attempted to do is to give a critical and systematic exposition of a branch of the law rather than another pedestrian statement of its contents.

In the first chapter, Professor Williams has profoundly altered Salmond's now well-known definition of contract. In so far as he has cleared up Salmond's confusion of assent with agreement, his alterations are much to be praised. But in so doing he has introduced the notion of the "declaration of will" and of the "act in law." However appropriate to continental theories of contract, these notions seem foreign to the English system. Their introduction is due, in part, to Professor Williams' anxiety to treat specialty contracts as an integral part of an entire theory of contract. Though he is justified indeed in refusing (see p. 18, note c) to regard specialty contracts as a regrettable anomaly, it may nevertheless be proper to attend to the profound difference in history between specialty and simple contracts. If in spite of that it is thought necessary to treat them together, the notion of promise or undertaking may well be found simpler and more consonant with English theory than the notion of declaration of will. It is in any case desirable that this first chapter should be simplified in subsequent editions, the definition of contract in particular, attempted in s. 13, appearing unduly complex. It may be noted, with pleasure, that Professor Williams has abandoned Salmond's view that the office of trustee is a matter of status, but he has been unable to extricate Salmond from all the difficulties involved in the view of status which that author adopted.

In view of the numerous improvements introduced by Professor Williams, it is to be regretted that he has retained Salmond's use of the word "implied" both as regards contracts and particularly as regards terms. It is even more regrettable that Salmond's astonishing distinction between a promise and a warranty has been also retained. In Salmond's view of a warranty—namely that the primary and only obligation so created is to pay damages upon non-fulfilment—we find an attenuated ghost of Holmes' fallacy; and it might reasonably have been supposed that this fallacy had now wholly been laid to rest. And it is perhaps most to be regretted that there has been retained Salmond's remarkable disquisition upon the nature of a chose in action. The offending section has been moved from p. 393 in the original edition to p. 29 in this edition: it would far better have been removed entirely.

The merits of Professor Williams' book may perhaps be judged from the temptation it affords a reviewer to comment upon it. It certainly retains the great power of stimulation which characterized Salmond's books, though it is markedly more thoughtful. I may perhaps be permitted to express the hope that Professor Williams will decide to write his own account, free of the trammels imposed upon an editor of Salmond.

C. J. HAMSON.

THE VIRGIN ISLANDS'

DR. LUTHER H. EVANS, Chief Assistant Librarian of the Congress Library, offers us a valuable and well-documented study of the administration of the American Virgin Islands from 1917 to 1935; but, although parts of his book have been revised

The Virgin Islands: From Naval Base to New Deal. By Luther H. Evans, Ph.D. (J. W. Edwards.) \$3.50. 365 pp.

since it was written in 1935, it has not been brought up to date on recent publication. Consequently, it is possible, and indeed probable, that some of the defects in administration mentioned have been remedied during the last decade; while success or failure may have attended carefully laid plans for the economic betterment of the islanders, e.g., the all-important "homestead project" which Dr. Evans so rightly describes as the foundation stone of the rehabilitation programme.

The Virgin Islands, about one hundred in number, were discovered by Columbus in 1493 on his second voyage and were named by him *Les Virgines* after St. Ursula and her eleven thousand Virgins, British Martyrs, who some time between the third and fifth centuries "met a glorious death in defence of their virginity from the army of the Huns." Many of the islands are uninhabited to this day. Some 32 with a total area of 58 square miles have been British since 1666 and constitute one of the four Presidencies of our Leeward Islands colony.

The Americans acquired their three Virgin Islands of St. Thomas, St. John, and St. Croix from the Danes in 1917 for twenty-five million dollars for security reasons. They were so acquired not so much in order to establish an advanced naval base, for which Puerto Rico afforded as good facilities as St. Thomas, as in order to frustrate Germany's intention to compel Denmark to cede the islands to her. Dr. Evans describes the United States as "an anxious buyer who had actually made a threat to seize the islands in certain eventualities." The islanders voted overwhelmingly for the transfer and a referendum in Denmark resulted in a substantial vote of 283,694 to 157,596 in favour of the sale.

It was by no means the Americans' first attempt to acquire the islands. Notably, in the 'sixties of the last century, negotiations for the cession had gone as far as an overwhelming vote in favour by the islanders, the consent of both Houses of the Danish Parliament, and the signing of a treaty by the King of Denmark on January 1, 1868, only for the United States Senate to refuse to ratify the treaty. Again, in 1902, another treaty for the cession, accepted by the Senate and the Danish Lower House, was rejected by the Danish Upper House on a casting vote after a tie.

The Danes had ruled St. Thomas since 1672, the nearby island of St. John since 1717, and St. Croix 40 miles to the south of St. Thomas, which was bought from the French for 750,000 livres, since 1733. Dr. Evans devotes a very interesting chapter to the history of the Danish occupation. He is even able to give population statistics for the three islands covering the period 1773 to 1911 when the last Danish census was taken. From 28,582 in 1773 it rose to the peak of 43,178 in 1835, and from then onwards it gradually declined to 27,086 in 1911.

In St. Thomas, where the population increased from 4,371 in 1773 to a peak of 14,389 in 1880, the numbers had fallen to 10,678 by 1911. This decline may fairly be attributed in an island, so largely dependent on its harbour, to the great change in shipping conditions resulting from the substitution of steam for sail, and to the failure of the authorities to revive agriculture as an alternative means of livelihood.

In the sugar islands of St. Croix and St. John it is difficult to account for an even more noteworthy decline in population. In St. Croix the 1773 population of 21,809, which had risen by 1796 to 28,803, had fallen to 15,467 by 1911; while the St. John 1773 population of 2,402 had fallen to 941 by 1911 after touching the peak figure of 2,555 in 1841. This depopulation may be attributable, as Dr. Evans suggests, to the emancipation of the slaves in 1848 without compensation to the owners; the inefficiency of the free labour which replaced the slaves; the consequent bad relations between master and servant; and the competition of beet sugar. But it is curious that precisely the same conditions, except that the owners were compensated for the loss of their slaves, were experienced in the British West Indian sugar islands, without any such decline in population.

When the Americans took over in 1917, the population of the three islands had still further declined to 26,051; and in 1930, after seventeen years of United States rule, a further fall to 22,012 had occurred. Meanwhile, the population of the British West Indian islands was increasing in every colony—from 1,719,000 in 1896 to 2,514,000 in 1936.

There are three financial policies which a Colonial Power may adopt towards its dependencies. It may content itself with giving them only those services which the local revenues can finance, regardless of the low standards of services which it may entail; and this policy of self-sufficiency is that which until recently

we have pursued in our Colonial Empire. Or the mother country may reinforce the local revenues by means of subsidies, so that the Colony may have those social services which some modern consciences demand for all mankind, a policy which we are now adopting in pursuance of the Colonial Development Acts. Or the mother country may go yet further and consider herself under an obligation to elevate her wards to her own standards. Apparently some Americans favour this third course for the Virgin Islanders.

In practice, the Americans appear to have adopted the second course with a tendency at times to embark on the third course also. Flying, as I did in 1942, from the British island of Antigua with its tumbledown hospital, its ramshackle and utterly inadequate schools, its shameful sanitation, its primitive water supply, its slums, and its general air of poverty and decay, to St. Thomas, I felt that I had been transported on a magic carpet to a modern country where plenty and prosperity seemed to reign. But it did not take one long to realize that this air of prosperity was imported and artificial, created in peace time by doles from the United States Treasury and in 1942 war conditions by the presence of the American armed forces.

From St. Thomas I travelled by a United States minesweeper to Tortola, the metropolitan island of the British Virgin Islands. There is no more backward unit in the British Colonial Empire. The average annual revenue and expenditure are in the neighbourhood of £5,000 for some thirty-two islands, some uninhabited. Even in Tortola there are no roads; but there is a good cottage hospital; and there are elementary schools run by the Churches. Despite the primitive conditions the death rate in 1937 was only 10.9, a remarkably low figure, and the birth rate 31.0, indicating a crude rate of increase in population of 20.1 per thousand. The Moyne Commission of 1938-39 found that the population of the British West Indian Colonies was increasing at a rate of somewhere between $1\frac{1}{2}$ per cent. and 2 per cent. per annum. It observed that a population increasing at the rate of 2 per cent. per annum doubles itself in 35 years.

When the islands were acquired in 1917, Mr. Lansing, the Secretary of State, thought the United States had made a good bargain. Not only would the harbour of St. Thomas be a great military asset, but the islands could be made self-supporting and might even afford profitable trade opportunities. But fourteen years later President Hoover, on a visit to the islands, declared that they had practically no value for the United States except in dubious and remote naval contingencies; and that it was a misfortune that they had ever purchased such "an effective poorhouse." Later, a Senator after surveying the islands reported that they could never be made to pay their way and is credited with the suggestion that Denmark should be paid to take them back. The 1939-45 war has almost certainly caused Americans to modify their views and to value St. Thomas more highly from a defence standpoint; and they hope, no doubt, that their lavish expenditure of the nineteen-thirties on education, including a vocational school, on health and particularly the eradication of malaria, on water supplies, on agriculture and an agricultural experimental station, on reafforestation, and on the creation of peasant holdings, or "homesteading," as the Americans apparently call it, may now pay rich dividends in the increased prosperity of the people.

But this prosperity cannot be achieved by the Government alone, however beneficent and lavish it may be. The ready co-operation of the people themselves is essential. Is this to be expected from a people who are prepared to work for only three or four days a week, however urgent the job in hand, or who, when they do work, require constant supervision?

The Caribbean islands have grave moral as well as economic problems. To the solution of both the greatest contribution which the State can make is undoubtedly the acquisition of the large estates and the division of them into small-holdings to be cultivated by peasant proprietors. For a smallholder will find a wife and eventually his children an economic asset rather than the financial liability which they represent to a man who labours for others.

I, therefore, regard the homestead project as the most important in the rehabilitation programme; and I cordially agree with Dr. Evans that it bids fair "to have a far more profound effect on the economic and social situation regardless of whether the Islands ever become self-supporting" than other items in the rehabilitation programme. But I cannot doubt that there will be many disap-

pointments to face and many difficulties to overcome before the American Virgin Islands are converted from a big landlord to a prosperous smallholder economy.

Dr. Evans's book should be studied by all interested in the modern trends of Colonial policy and particularly by those who believe that a lavish expenditure of the British taxpayers' money under the Colonial Development and Welfare Act of 1945 will solve the problem of poverty and squalor in the British West Indies and usher in a new era of plenty and prosperity. Such a policy, generously pursued by the Danes from 1900 to 1917 and by the United States thereafter in the American Virgin Islands, has met with no very encouraging results hitherto.

DOUGLAS JARDINE.

THE DEVELOPMENT OF INTERNATIONAL LAW

Of the five books mentioned below containing ideas of some interest in relation to the future development of international law, the first, entitled "Common Sense To-day," is by Dr. Kurt Lachmann, a former member of the Berlin Bar (Torchstream Books, 2s. 6d. net). The author advocates the development of a body of "Universal Law," claiming domination in a purely ethical sphere, as distinguished from the political and social sphere of State law, which, in its dealings with matters whether national or international, is subject to national sovereignty. This Universal Law, he assumes, would create a common and unconditional obligation binding in the ethical sphere between every nation and the nationals of all other nations, and between all nationals irrespective of their nationality, but would be dependent upon no "apparatus of compulsion." He claims that human action is always directed by the compelling power of the individual will, and that the "apparatus of compulsion," set in motion by an "external" will, though commonly regarded as the real essence of law, is unnecessary and works disruptively in a legal sphere which, by its very nature, stands apart from the political domain.

His Universal Law is not to undermine the authority of the State, and yet it is to override all positive national law. It is not clear how it is to come into existence. At p. 9 he says it would depend upon a single Treaty between all nations of the World which once and for all would bind all States to submit automatically and irrevocably to such law. Elsewhere he speaks of an autonomous organization which issues binding laws within the scope of its competence, a central and universal authority performing a multiplicity of functions, and a Charter in the form of statutory law in order to make Universal Law effective and indisputable. In another passage he contemplates that an individual shall have a right of appeal to a World Court against a government which treats him in a manner inconsistent with the Universal Law. Obedience by all to the pronouncements of the World Court appears to be assumed. It is a large assumption.

The whole thesis rests upon the author's belief that "a Universal Law, which brands the acts of a single group or class or government, because they are at variance with the declared will and common faith of the rest of mankind, will have a stronger and more direct effect upon man than any law based on coercion," and his conviction that "there exists in men—in all individuals alike—a moral power which will drive them, by their inner impulse, readily to obey and steadfastly to adhere to the rules of Universal Law." It is an attractive theory, but does it square with the real nature of the world around us and the actual proclivities of existing nations?

The main value of the book seems to me to lie in its direction of attention to the need that in connection with any scheme for international legislation regard must be had to the fact that behind the governments lie the individual citizens they represent, and peace will not be secure unless some sufficient guarantee exists for freedom of the individual from oppression and injustice, and the obligations of governments and the functions of the international organization are framed accordingly.

The next book is of a different order. It is a work of high quality and practical value written by Dr. Appadorai, formerly of Loyala College, Madras, under the title "The Substance of Politics" and published by the Indian Branch of the Oxford University Press (price 6 rupees).

The author modestly describes it in the preface as an attempt to state briefly and simply the essential principles of political theory, and organization, and says that it has been written primarily to meet the needs of the undergraduate. It

seems admirably fitted to serve that purpose. Covering a very wide subject or collection of subjects, and freely illuminated by well-chosen quotations from other writers, the book is yet so concisely written that it compresses into just over five hundred pages not only a clear exposition of the various types of government and constitution and their methods and processes and underlying principles, but also descriptions of the main features of the actual constitutions of a series of countries, Britain, France, U.S.A., the Dominions, Switzerland, the Totalitarian States and India, and short accounts of the Greek City-State, the Government of Rome, Medieval European Polity, and "the Modern Period."

To anyone engaged hereafter in the supremely important task of framing necessary changes in the constitution of the United Nations Organization it will be invaluable to have a wide knowledge and understanding of useful models in the constitutions and laws and practices of existing national States and Federations. The method of comparative legislation has scope here for its highest usefulness. Dr. Appadorai's book provides good material in this regard, as well as for use of the same method in the work, so often now required, of framing or changing constitutional laws for national States or Federations.

The next volume is the Report of the Proceedings of the International Law Conference held in London in 1944 at the instance of the Grotius Society. It contains, among other things, an interesting paper by Dr. C. John Colombos under the title "The Shape of Things to Come," and the report of the discussion on that paper, opened by Professor A. L. Goodhart. Dr. Colombos referred to five documents which he claimed as strengthening and confirming the main points outlined in the Atlantic Charter. After referring to certain conclusions to be drawn from these documents, Dr. Colombos said that the critics of international law were apt to forget that no law, much less international law which is of such universal application, can properly function in any society of nations or individuals in which chaos and war prevail; and that an essential condition of the supremacy of law is an organized community equipped with the right of opposing acts of violence, and of using, if necessary, force for their suppression.

Professor Goodhart, in discussing the steps which had been advocated by various authorities for enforcing peace, observed that one was by the creation of such machinery as that of which Dr. Colombos had spoken. "The aim," he said, "is to provide that all disputes must be compulsorily adjudicated by an international authority. All strictly legal questions are to be decided by an International Court similar to the Permanent Court of International Justice at The Hague, while non-legal disputes are to be referred to an equity Court, or some other arbitral body which will decide the case according to the principles of justice. It is highly probable that some such Courts will be established after the war, but it is far from certain whether they will be given compulsory jurisdiction. Here we are faced with a crucial question because, until some provision is made for compulsory adjudication in all cases, we will always be faced with the threat of war." No doubt some form of peaceful settlement ought to be obligatory for all international disputes, and the International Court of Justice seems the appropriate tribunal for compulsory decision of disputes of a purely legal character, but for the compulsory settlement of disputes about matters of political and economic interest and relationship, which are more likely to involve the threat of war, I think a process of a legislative character is more suitable and offers greater hope of working successfully. In some cases the appropriate solvent for a political or economic dispute may be found in the enactment of a general international regulation, not confined to the particular disputants; in other cases, although a preliminary examination into facts and a hearing of the arguments of disputants by a small and impartial body in the nature of an "equity Court" is likely to be very necessary, the final decision ought probably to have the approval of a legislative assembly in which all States can have a say and whose adjudication will constitute a law carrying the authority of the whole international organization.

The importance of Professor Goodhart's statement that "until some provision is made for compulsory adjudication in all cases we will always be faced with the threat of war" comes forcibly to mind in reading a paper by Wing Commander W. J. Heyting on "The Organization of Post-War Peace" in the Transactions of the Grotius Society for 1944, another of the five volumes. That paper contains a

valuable study of the difficulties confronting all endeavours after the prevention of war. The author examines the reasons for the failure of various types of agency, association and influence which have been resorted to with this object in view, and various methods that have been advocated for future application. He comes to the conclusion that "having regard to the weaknesses that have proved fatal to previous attempts that have been made, only one course is open that is likely to be both practicable and effective, and that is the maintenance of a supreme and overwhelming force to prevent aggression." While not questioning the need for other international institutions, such as "a League of Nations or a Court of International Justice or an Equity Tribunal to settle non-justiceable disputes," he treats such matters as "developments that might become practicable once the peace of the world is assured by a force capable of giving reality to the rule of law and justice." I cannot help thinking that this is an over-simplification of the problem, and that the establishment of the right means for determining where justice lies and what shall be the law is at any rate no less vital to peace and no less urgent than the establishment of an overwhelming force for controlling aggression.

The great importance of international justice as a factor in the problem of peace was well described by Mr. Sean Lester in the Introduction to a war-time Report on the work of the League of Nations, which is the last of the five volumes. In referring to the then coming preparations for the establishment of the new organization known as "the United Nations" he wrote, "The machinery to be provided and the texts prepared for future guidance will have a very real importance, but they must be moulded and interpreted as living instruments. Even more important will be the readiness to make sacrifices for peace, the progressive materialization of the world's passionate desire for justice—social and political—the growth of confidence between nations and the establishment of common moral standards of action. As these things find expression in the torment of post-war problems, the herculean task of rebuilding may be faced with hope and confidence."

The working of the machinery provided by the United Nations has not thus far given great occasion for hope and confidence. Like the League of Nations, the organization has suffered the inevitable consequence of the absence of provision for decisive majority-voting and the lack of legislative power, and has thus been the scene of prolonged and inconclusive controversy. If it is to be "a living instrument" and one that will really inspire "hope and confidence" throughout the world I think it must be given a new foundation in an effective system of international law, capable of development, through suitable machinery of international legislation, in response to the imperious demands of peace and international justice.

F. N. KEEN.

Traité de Droit Commercial Belge. Vol. I. By Louis Fredericq. (Ghent. Rombunt-Fecheyr, 1946.)

Comparative Law has many pitfalls for the unwary, and among these not the least dangerous is the assumption so often made that systems of law which have a common origin and the same terminology can, for all practical purposes, be treated as identical. French and Belgian commercial law are in both instances based on the *Code de Commerce* of Napoleonic origin, but, with the exception of the law relating to insolvency, which is the same, the two systems have diverged on many points. These differences can be found not only in the statute law but also in the *jurisprudence* or case law of the two countries. It is obvious, therefore, that a work such as the one now under review is essential to all who wish to obtain an accurate knowledge of the provisions of the Belgian law. Its value is further enhanced by the fact that no such comprehensive treatise on the subject has appeared since Professor Namur's famous commentary on the Belgian *Code de Commerce* which was published in 1884. In this volume a well-known Belgian lawyer deals with commercial acts, commercial persons and the commercial courts in Belgium. Apart from its intrinsic value as a guide to Belgian law, the book contains much that is of special interest to comparative lawyers. In this connection mention may, perhaps, be made of the measures called for by the fact that three languages, i.e., French, Flemish and German are spoken in different parts of Belgium, thus giving rise to certain problems, some of which still await solution.

H. C. GUTTERIDGE.

INTERNATIONAL LAW

THESE four volumes are continuations of works well known to readers of this *Journal*. The appearance of the new volumes of the *British Year Book* and the *Annual Digest* were matters for special satisfaction because they signalized the waning of the Axis power to interrupt International Law studies. They maintain, despite wartime difficulties, the exacting standards which we expect in these two publications. The sixth edition of Oppenheim, volume ii, dealing with Disputes, War and Neutrality, is also welcome, but with rather more reserve. This reserve is not due to any deficiency of editorship, against which the name of Professor Lauterpacht is complete guarantee, but owing to the necessarily insufficient character of any revision of the law of war and neutrality in the year 1944.

The publication of the *British Year Book* was suspended in the years 1940-43, inclusive, largely because contributors were engaged on urgent war work. Regret at this interruption may be tempered by the thought that it would perhaps, in any case, have been difficult in those years to write on international law in proper perspective. The 1944 volume⁸ has the usual features of the series, including eight full articles and six smaller articles in the form of notes. There is no section dealing with decisions of International Tribunals, which had ceased operating, but there are two sections containing respectively the decisions of English courts in 1939-42 on international law, and the decisions of English courts in 1939-43 on trading with the enemy.

Professor Gutteridge contributes an interesting article showing both the uses and the limitations of comparative law as a source of the principles of international law. Dr. Mann, in an article on the law governing State Contracts, draws attention to the intervention of States in industrial and commercial activities and emphasizes the need, particularly in the sphere of State loans, for classifying State Contracts as belonging to public international law or to private law. The diplomatic immunities of consular officers are far from being adequately treated in the usual text-books, and Mr. Beckett fills the gap with a lucid and authoritative article. Professor Brierly in "Vital Interests and the Law" makes a strong challenge, developed at greater length in his "Outlook for International Law," against the idealist doctrine that international law should, here and now, insist upon States submitting even their vital interests to the control of law. He insists that the creation of an effective security order is a pre-requisite to States surrendering their vital interests to the system of international law, an opinion shared by this reviewer. A legal system must take account of the facts of life or break down. This was recognized at San Francisco, whatever particular defects there may be in the machinery established by the Charter. If the prospects under the United Nations seem less bright than at the foundation of the League, the chief reason is the less favourable political conditions. Professor Lauterpacht contributes a reasoned statement of the legal justification of the punishment of war crimes, with particular reference to the responsibility of individuals, the bases of the jurisdiction, superior orders, uncertainty of the law, the effect of the doctrine of reprisals and the position of neutral States in regard to the surrender of war criminal fugitives. Many of the views expressed in the article have been given effect in the measures taken to bring the Axis war criminals to justice. The article does not, however, touch upon some of the points which have troubled the public conscience in the prosecution of the major criminals, for instance, to mention only one, the alleged retroactive effect of the Charter of the Nuremberg Tribunal in specifying aggression as an international crime. The remaining articles are by Dr. C. J. Colombos on "Unification of Maritime International Law in Time of Peace," by Mr. J. Mervyn Jones on "Modern Development in the Form of International Agreements" and an excellent unsigned article on the "Implied Recognition of Statehood and Belligerency."

• Interesting items in the remainder of the volume were Professor Bentwich's note on statelessness resulting from the peace treaties after the first world war and Dr. Spaight's note on legitimate objectives in air warfare goes to extreme theories of military necessity to find justification for our methods of air warfare in the second world war, thereby rendering criticism of German submarine warfare in either world war hypocritical. Not every reader of this *Journal* may be ready to accept his almost total abrogation of the distinction between civilians and combatants. It does not seem to the reviewer that in the state of the law of 1939—equivocal though

⁸ *British Year Book of International Law*, 1944. Vol. xxi, pp. vii, and 272. £1 5s.

it was—the legal justification of the bombing of the civilian population can be carried beyond a recognition of their liability to all risks incidental to bona fide attack on military objects, which, however, might cover a large part of air bombing. He would also question Dr. Spaight's account of the process and grounds upon which enemy merchant shipping was submitted to attack by British forces without warning.

The 1945 volume⁹ of the *British Year Book* contains eleven full articles and six long notes, all of considerable interest. There is again no section for decisions of international tribunals but there are short sections continuing the review of decisions of English courts on general international law (1943–4) and on trading with the enemy (1944).

Three of the articles are primarily of academic interest. The first on Leibniz by Mr. J. W. Jones gives a lively account of the philosophy and writings of that seventeenth-century realist. Dr. Glanville Williams in a limpid-clear paper on "International Law and the Controversy concerning the Word Law" argues that this hoary disputation is mainly much misunderstanding about each other's use of definitions. Mr. W. L. Walker in "Territorial Waters and the Cannon Shot Rule" questions the traditional view of the origin of the three mile limit in the cannon-shot rule. He presents a case, based on wide research, for the view that the two rules were distinct in origin and that the roots of the three mile limit are to be found rather in the practice of the Scandinavian States.

Mr. C. W. Jenks contributes an important paper on "Some Constitutional Problems of International Organisations" dealing particularly with the subsidiary organizations of the League and of the United Nations. The significance of these subsidiary organizations in the creation of an effective world order is now well recognized, and Mr. Jenks, whose practical experience as Legal Adviser to the I.L.O. gives him special authority in this field, expresses opinions which merit close study. Later in the volume he adds a Note on "Legal Personality of International Organisations," in which he urges that it should be the general practice to invest them specifically with legal personality and for individual States to make that personality effective in municipal law by any necessary legislation. Professor H. Lauterpacht provides an exhaustive article on "De Facto Recognition, Withdrawal of Recognition and Conditional Recognition." He contends *inter alia* that the principal distinguishing feature of *de facto* recognition is that it is provisional and liable to withdrawal. The footnotes to this article contain much interesting material and should not be missed. Dr. G. Schwarzenberger, in the "Most-Favoured Nation Standard in British State Practice," having traced the history of the M.F.N. clause in British treaties, examines the scope of the standard to-day and relates it to other standards of international economic law.

One of the most striking features of economic warfare in the Second World War was the comparative paucity of legal developments due to the consolidation of the law in a comprehensive and reasonably modern form during the First World War. Mr. C. G. Fitzmaurice in "Some Aspects of Modern Contraband Control and the Law of Prize" gives, however, an interesting account of developments in the machinery of contraband control. He also stresses the diminished importance of condemnation in prize proceedings as a bar to the goods reaching the enemy. Mr. R. Y. Jennings in "International Civil Aviation and the Law" reviews the attempts in multilateral conventions to establish a comprehensive system of international air law. He also contributes one of the Notes, an attractive exposition of the question of Open Towns in air warfare.

The status of the many millions of British Protected Persons has received comparatively little attention. Mr. J. Mervyn Jones in "Who are British Protected Persons?" divides them into three classes and discusses their respective positions in both municipal and international law. Dr. K. Lipstein re-examines the troublesome problem of the "Place of the Calvo Clause in International Law." The "Transfer of Chattels in the Conflict of Laws" is dealt with in a challenging article by Mr. J. H. C. Morris, who makes a searching analysis of transfers in two distinct situations—(a) when chattels situate in one State are transferred in another and (b) when chattels are taken out of one State by someone not the owner and dealt with in a second State.

Two of the six Notes have already been mentioned. There are also two by

⁹ *British Year Book of International Law*, 1945. Vol. xxii, pp. vi and 341. £1 7s. 6d.

Professor N. Bentwich on "Jurisdiction of English Courts in Divorce and Nullity" and the "Legal Aspects of the Restoration of Ethiopian Sovereignty." The remaining two are on "International Monetary Co-operation" by Dr. F. A. Mann and the "Relation of International Organisations to Municipal Law and their Immunities and Privileges" by Professor Lauterpacht. The Sections reviewing the decisions of English Courts, though not containing matter of outstanding importance, round off a volume of the *British Year Book*, the high level of which provides ample proof that the study of international law in this country is very much alive.

The *Annual Digest*¹⁰ for 1941-42 differs from its predecessor both in regard to the courts whose decisions are reported, and in the subject-matter of those decisions, reflecting, as it does, the peculiar circumstances of the second world war. Firstly, with two very minor exceptions, this volume contains no decision of an International Tribunal, for the simple reason that there were none. Secondly, Axis domination of Europe strangled the courts of European States so that continental Europe, apart from Germany and Italy, contributes a mere handful. There is, for example, no case from France, and even the reports from Germany and Italy were not readily obtainable so that the total contribution from the continent is not more than twenty. Switzerland provides a few cases, including *Kampfer's* case, in which it was held that the investigation of the affairs of a Swiss company, subsidiary to a German company, by a German chartered accountant, at the direction of German authorities, was a violation of Swiss sovereignty. Sweden contributes, in the *Rigmor*, one of the several cases in the *Digest* on the exemption of Government-operated ships from local jurisdiction, a question of the highest importance to Allied control of the merchant shipping of countries overrun by the Axis. The *Rigmor* had a special interest since, on Hitler's personal instructions, Germany was exerting considerable pressure on Sweden not to allow the ship, and several other Norwegian vessels, to sail from Swedish ports. The Swedish Supreme Court, reversing the Court of Appeal, upheld the immunity of the vessel from arrest as a ship in the possession of H.M.G., and used for public purposes.

There are no cases from the Far East. Thirty-four cases are reported from Central and South American jurisdictions, but these are, for the most part, brief summaries or notes of decisions. A large part of the volume consists of decisions of the courts of the United States and the British Commonwealth. Numerically, about three-fifths of the cases are from these two sources, and probably at least three-quarters of the whole volume. For, whereas many of the cases from Europe and Central and South America are noted very briefly, the majority of the cases from the United States and the Commonwealth are reported either in full or as very full digests. Among the interesting cases are one from Canada on the levying of rates on diplomatic property, a United States case on the interpretation of treaties between the United States and Indian tribes, and two United Kingdom prize cases, the *Pomona* concerning "Days of Grace" for enemy ships, and the *Prinz Knud* on the enforcement of claims to salvage for services to an enemy vessel before her capture. These cases are mentioned only as samples of the considerable amount of important material to be found in the United States and Commonwealth cases.

Professor Lauterpacht, in his preface, makes interesting observations on the policy of the Editorial Committee of the *Annual Digest*. It has already been mentioned that the reports in the English language in the present volume are, for the most part, in full. The policy of the Committee is, gradually, to transform the *Digest* into Reports, a policy for which users of the series have, it is stated, voiced their support. The aim is to convert the present biennial publication into Annual Law Reports of International Law cases. The present volume certainly confirms the wisdom of this policy, for the Digests are frequently unsatisfying and chiefly valuable as putting the reader on the track of the cases. It would be a great advantage to users if the worth-while cases were reported in full, or nearly so, at the cost of jettisoning altogether some of the less worth-while. The inevitable bulk of the volumes under the new policy may, however, raise a problem and force a policy of greater selectivity. For one thing, any tendency to prolixity in judicial announcements has fertile opportunities in the sphere of international law. Thus, in one United Kingdom case in the present volume, the report occupies twenty-four pages, of which the Lord Chancellor consumes three and a half, and one of his

¹⁰ *Annual Digest and Reports of International Law Cases*, 1941-42. H. Lauterpacht.. Pp. xxxiv and 607. £2 15s.

colleagues fifteen. Professor Lauterpacht ventures to express the hope that the series of reports may, in time, also be carried backwards as far as the year 1794, and thus constitute a comprehensive *corpus juris gentium*. He rightly claims that, prodigious though such a task would be, it would make an inestimable contribution to the building of a new international order on sound foundations.

In conclusion, it should be said that Professor Lauterpacht promises a companion volume to this, the tenth volume of the series. The additional volume will contain reports of cases for one reason or another previously omitted. It will also provide a cumulative index which readers of this *Journal* will surely find of the highest value.

The new edition of the second volume of Oppenheim¹¹ requires little comment because, as Professor Lauterpacht frankly states in his preface, it is not fully a new edition, but is really a stopgap re-issue of the sixth edition, with some revision and additions. Moreover, the book is being reviewed in this *Journal* two years after publication, when the institution of the United Nations in place of the League has rendered out of date a portion of the book.

The reason why the revision undertaken in this edition was only partial is that Professor Lauterpacht considered it impossible, at the date of publication, to revise the volume systematically with reference to practice of belligerents in the second world war. Some years will be required before the assessment of the available evidence would render the task of revision both complete and reliable. On the other hand, the previous edition had been exhausted, and we cannot cavil at the decision to bring out this re-issue. The revision goes to the length of including references to major occurrences of the second world war, such as the *Altmark* and air bombing, though the latter is touched upon very lightly.

The editor draws attention to two new sections. The first is on the surrender of war criminals by a defeated belligerent, which sets out briefly some of the points made in his article in the *British Year Book*, noted above. The second section is on the modification of neutrality during the second world war, and deals primarily with the legal aspects of the position of the United States before becoming a belligerent. Professor Lauterpacht is concerned to show that such "unneutrality" as the Destroyer-Bases deal of 1940, and the Lend-Lease Bill of 1941, were legally founded upon the fundamental alteration in the place of neutrality in international society, resulting from the Kellogg Pact. He mentions the Declarations of Neutrality, which so many States made in the years 1936-39, when collective security had broken down, including the Pan-American General Declaration of Neutrality. He alludes to the importance of self-defence as an element in the United States policy of qualified neutrality, but highlights the relations of the President and Congress on the right to discriminate against a violator of the Kellogg Pact. The reviewer recognizes the importance of the discriminatory action of the United States, combined with the appeal to the Kellogg Pact as a legal precedent for the future, but considers that the new section may lead students to view the United States' action out of perspective. The hard fact is, that no States, except Great Britain and France, intervened in the second world war in direct fulfilment of an obligation, and even they acted upon a particular treaty obligation to Poland. Even the United States remained neutral, in the old-fashioned sense, until either attacked, or driven to qualified neutrality in self-defence by the Axis domination of Europe and threat of world domination in 1940. There was much sympathy and assistance from the United States, but without any qualification of their legal neutrality until after these developments, and then the Destroyers-Bases deal was represented initially as an act of self-defence, not of discrimination against an aggressor. The significance of the legal precedent remains, provided that there is a full realization of the by no means negligible part played in the second world war by old-fashioned neutrality. Incidentally, the statement in a footnote on page 505, that in *Stankus v. New York Life Insurance Company*, the Supreme Court of Massachusetts decided that the actual hostilities between the United States and German forces in 1941 in the Atlantic constituted "war" within the meaning of an insurance policy is not borne out by the report of that case in the *Annual Digest* of 1941-42.

C. H. N. WALDOCK.

¹¹ Oppenheim, *International Law*, Vol. ii. *Disputes, War and Neutrality*. Edited by H. Lauterpacht. Pp. xciv and 766. £2 10s.

THIS pleasantly entertaining book¹² is about the Colonial Office as an office and not about Colonial Policy: it is not, however, a history of that Office: it gives the reader two pictures of the office, the first as it was in 1909, when Sir Cosmo Parkinson joined it, and the second, 36 years later, when he left it. In the meantime Parkinson had moved, by an orderly progression of promotion, from the base of the administrative "pyramid" to its apex. In those 36 years there were 18 Secretaries of State, i.e., a fresh Minister on the average of every two years (Parkinson's mild complaint about this will find an echo in the minds of many senior Civil Servants) and eight Permanent Under Secretaries of State, making the average tenure of that post between four and five years.

Some acquaintance with the trend of Colonial policy is needed if the reader is fully to appreciate the significance of the differences between the two pictures, but almost every feature and detail of the second one illustrates and emphasizes the extent and diversity of the development of Colonial policy within the period. The momentum begun when Joseph Chamberlain was Secretary of State, from 1895 to 1905, seems clearly to have continued and to have accelerated throughout the following fifty years. (Recent announcements as to the very large sums to be devoted to economic and social development in the Colonies show that the acceleration is continuing in greatly increased measure.)

The most striking difference between the two pictures (apart from the very great increase in the volume of work) is due to the development of specialized divisions within the Office—"subject departments" the author terms them—and to the appointment of a considerable number of specialist advisers. While geographical departments (which made up almost the whole of the Office in 1909) have been retained "subject departments have been springing up with almost mushroom-like rapidity and now far outnumber the others." Nor does the organization of the office begin and end with the departments: "there is now a veritable galaxy of advisers." Students of administration will be interested in Parkinson's discussion of the question of geographical departments (e.g., Ceylon and Pacific; Eastern; Mediterranean; Middle East; West Indies) *versus* subject departments (e.g., Accounts, Communications; Defence; Economics and Finance; Personnel). He leaves little room for doubt as to his own faith in the advantages of the former. Admitting that subject departments have come to stay, he adds "but it will be a sad day if these upstarts get out of control and bring about the elimination of the geographical departments," and he predicts that if this should ever come to pass there would be within a matter of years a demand for their revival. He stresses the advantage to a Colonial Governor to be able, when visiting this country, "to discuss all the affairs of his Colony with one co-ordinating department which, just as he does, looks at the whole picture, as well as having particular discussions with this or that subject department. And there is a humanity and an intimacy in the relations between a Governor and a geographical department which, in the very nature of things, there cannot be between a Governor and a department dealing with the Colonial Empire at large." The use of the word "humanity" here is admirable. There will be, however, many other official visitors from the Colonies, most of them concerned with a particular aspect of administration—economic, medical, educational—and these may well profit most by discussion in the Colonial Office with the particular subject department or specialist adviser expert in their own subject. The more numerous, intense and active the interests of the Colonial Office in the administration of the Colonies—administration which is itself developing and diversifying locally with great rapidity—the more unlikely is it that one administrative officer in charge of a geographical department could master so many subjects well enough to meet adequately the demands for information and guidance coming from Governments concerned between them with some 60,000,000 human beings, located in a large number of separate Colonies.

The final chapter of the book, "The Colonial Office and the Colonies," deals interestingly with the relations between the Office and the Colonies and appropriately reminds the reader that there are Colonial Governments—very diverse in composition and all in a state of development—and that they have an increasing influence in the administration of their respective territories. With characteristic caution

¹² *The Colonial Office from Within*. Sir Cosmo Parkinson, G.C.M.G., K.C.B., O.B.E. (London: Faber & Faber. 1947.) Pp. 157. 8s. 6d.

Parkinson writes of an "impression" he has that "there was a rather different relationship between the Colonial Office and the Colonies when I entered the Office from that prevailing to-day," and "it was not out of keeping with the general attitude in those days for the Secretary of State to make *ex cathedra* pronouncements and to issue directions to Colonial Governments." A growing tendency in recent years for the Colonial Office to work with, not dictate to, Colonial Governments has taken the form of consultation: thus Colonial Governors receive informally drafts of important papers on policy. It remains the case that "the official language of dispatches is still . . . somewhat stilted" but "more than one can play at that game, and the style of a Governor's dispatch to the Secretary of State is the same as that used by the Secretary of State." The important fact is, however, that "nowadays consultation is the guiding principle of Colonial Office administration."

Apart from its interest as a description of a Government Office at two periods separated by 36 years (a description embodying a large number of very human recollections and reflections), the book portrays the great expansion which has taken place in "Government" in the period. In the chapter dealing with 1945, Parkinson tells us that "everything touching the lives of some 60,000,000 human beings is the concern of the Secretary of State." There were about the same number of human beings to be concerned about in 1909, but the concern then was distant and passive (though displaying many signs of coming change); now it is close and active. (In 1909 the bill for telegrams—including those to Colonies that have since become Dominions—was £7,000: in 1945-46 it was £140,000.) A Colonial Office that in 1909 could be leisurely dignified, and no doubt was, is now vibrating with innumerable activities, stimulated both by urgent communications from the Colonies—all of whom have been growing-up in the 36 years—and by the outcome of the complex organization of the Office itself.

H. J. W.

SOCIOLOGY OF LAW

To appreciate Professor Gurvitch's book,¹³ first published in America during the war and recently in England, three things are necessary: a complete understanding of sociology, a complete discarding of preconceptions as to the nature of law and considerable aptitude at solving cross-word puzzles. As to the first requirement, this book is essentially a thoughtful and important contribution to the advance of knowledge in the field of sociology, dealing with the purely factual interrelation of groups of human beings and the rules of conduct—one cannot call it law—which they are said to observe. Its understanding presupposes a knowledge of general sociology, such as Professor Haesaert's recent book¹⁴ admirably provides. As to the second requirement, the "Law" which Professor Gurvitch provides through sociology is not lawyers' law (which consists of the rules, principles, conceptions and standards applied by legislators and courts at any particular time), but a wider and far more general category of social control which the author defines (p. 47) as "an attempt to realize in a given social environment the idea of justice (that is, a preliminary and essentially variable reconciliation of conflicting spiritual values embodied in a social structure), through multilateral imperative-attributive regulation based on a determined link between claims and duties; . . ."

On the third requirement, one must be prepared to accept a vocabulary which includes such words as "absolutization" (p. 9), "anti-conceptualistic decisionism" (p. 10), "continuators" (p. 21), "delimitive" (p. 168) and many other unfamiliar phrases presented in a variety of significant combinations. While nobody expects a work of this kind to read like a penny newspaper, the author does less than credit to his ideas by clothing them in language of quite unnecessary obscurity.

"The Sociology of Law," writes Gurvitch, "is that part of the sociology of the human spirit which studies the full social reality of law" (p. 48) in all its progressive forms and stages, and its object is, by means of examination of actual group experience of all kinds, to penetrate the veil of patterns and symbols which tend to obscure and distort legal reality. The sociology of law is therefore a different science from sociological jurisprudence, as the author is at pains to point out; and though he describes Professor Pound as "the greatest American sociologist

¹³ *Sociology of Law*. By Georges Gurvitch. (London: Kegan Paul, Trench, Trubner & Co. 1947.) Pp. xv, 248. 18s. (American Edition, 1942.)

¹⁴ *Essai de Sociologie* (1946).

of law" (p. 19), it is a title which America's greatest sociological jurist, judging from his clarifying Preface to Dr. Gurvitch's book, would heartily disclaim. For while the sociology of law is concerned, theoretically at least, with pure observation of and deduction from ascertained facts of group living, sociological jurisprudence proceeds on the acceptance of a limited and relative ideal of a functional nature. The one seeks to answer the question, "What has society done for itself in legal matters?" the other, "How can law help society to help itself?" But the two disciplines come close to meeting on the common ground of justice, where only a difference of interpretation divides them. The general acceptance of a moral idea such as justice is as much a social fact as the existence of a specific rule of law, but it does, nevertheless, import into law an ideal element of however limited or relative a nature. Gurvitch discards justice as a criterion of evaluation, holding it to be a constitutive element of all law, good, bad or morally indifferent.

Much of Professor Gurvitch's book is taken up by a review of the work of his fore-runners and contemporaries from Aristotle to Karl Renner and Horvath. As a review of the work which has been done in the field of legal sociology, this survey is of considerable value. But the real interest of the work is contained in the last eighty pages, in which the author sets out his own theories of legal sociology. It is, unfortunately, impossible in a short review to set out even the broad outline of Gurvitch's main theses. They are patently Continental in origin and technique, though in parts (e.g., Chapter III on the differential sociology of law) of considerable interest to English common law and constitutional lawyers. The factual basis of sociology in general and of legal sociology in particular argues against generalization from one type of society to another. One is not convinced that the author has fully realized that the sociology of any legal system must depend on a study of the particular community in which the system operates. Consequently, deductions from the sociology of Continental communities can provide no more than persuasive generalizations for the sociology of English law.

Apart from the unusual vocabulary of this book, one could wish that the misquotation of Maine ("statute to contract") in the earlier American edition of Professor Gurvitch's book had not been repeated in the English edition (pp. 50 and 75), and that the Index was more adequate. At present it consists to half its extent of the names of sociologists.

There is nothing lukewarm about *Sociology of Law*. It will arouse great enthusiasm or great dislike. And is not either result a hall-mark of greatness?

R. H. GRAVESON.

Claims to Territory in International Law and Relations. By Norman Hill, Professor of International Law, University of Nebraska. (Oxford University Press: Geoffrey Cumberlege, 1945.) Pp. vi, 248. 12s. 6d.

This is a learned and careful study of a subject of International Law which might seem very opportune. For the Peace Conference has to formulate treaties with the ex-enemy states and deal in them with claims for territorial change. It was written in 1944, with that purpose in view. Yet it seems in some way to be Scholar's Labour Lost. For the victors in this war are not concerned with the conventions and practices of the old international law, but assert and confirm claims to territory on revolutionary principles. The carefully worked out doctrines and precedents which the author has gathered about strategic, geographic, historic, economic and ethnic claims may lend some specious arguments to one side or the other; but they will not give guidance to the claimants or protection to the defendants.

What the author says in his introduction about the origin of geo-politics indicates more realistically the actual basis of territorial claims to-day; and the other motives are obsolete. The German author of the term defined it as "a geographic organism or phenomenon in space, i.e., as land, territory, area, or most frequently as country." The Americans have their own ideological concept of "manifest destiny." And the Soviet Union have their concepts of Security.

The book in some measure covers the same ground as another American treatise, published a year or two ago, on *International Boundaries*. The earlier book was concerned also with the technical and scientific business of marking a boundary, while the subject of this work is essentially political and legal. In order to state the modern doctrine and practice, the book will have to be re-written when the five treaties that have been examined at the Paris Conference of 1946 are finally

signed and ratified. It may be hoped that the author will set about that work in possession of the full knowledge of the historic background. The contrast between the new technique and the old precisions would be illuminating. The author is probably right in his conclusion that no organization or procedure can chain the territorial ambitions of the modern state so long as the ownership of territory brings power.

NORMAN BENTWICH.

THE CUSTOMARY LAW OF THE HAYA TRIBE

THIS volume¹⁵ is indeed an addition to our knowledge of tribal law in East Africa. The authors have earned the gratitude of those who have, or will have dealings, administrative or otherwise, with the Haya Tribe. The amount of labour which has been expended in producing this body of law will be appreciated by those who have attempted to garner in similar fields. The traditions of the elders have to be levered, as it were, out of witnesses who are often vague and sometimes confused. It is difficult, and sometimes impossible, to know if one has reached the right conclusion.

The Haya occupy an area somewhat larger than Greece. Their country is to the west of Lake Victoria, between it and Belgian Mandated Territory of Ruanda-Urundi. The country roughly coincides with the Bukoba District (Lake Province) and is in British Mandated Tanganyika Territory. According to the Census of 1931 (since when a census has not been made), the total population of the Bukoba District was 277,200. Hence the number of persons to whom this "customary law" applies is something over a quarter of a million and something less than three hundred thousand. It has, therefore, a strictly limited interest and application.

Doubtless the volume will attract students of native law and custom other than officers serving in Bukoba, but they will find the going somewhat hard. For their benefit the book might have been arranged more logically not to say conveniently. It opens with the law of inheritance. We should like to know something about the people who are going to inherit without hunting up the Appendix. That is to say the history of the tribe should have preceded and not followed their laws. Even that history might have been amplified, for the authors treat what they call "superstition" too cavalierly.

Again the book assumes, or seems to assume, that the reader knows something about colonial administration—and Tanganyikan at that. We are told in the Introduction that the first drafts were submitted to "Native Court Assessors." Yes, but who are these gentlemen and with what authority do they speak? As soon as page 3 is reached we read about a "Chief's Court Appeal," a "P.C.'s" and a "D.O.'s" Appeal. What does all this mean? Who and what is a P.C. or a D.O.? Are they jointly or severally authorities on native law? Without some sort of knowledge of colonial jargon the ordinary student will be at a loss. It would not be surprising if he is irritated. He reads, for example, on page 2, "The Mainuka of a man. . . . (except in Ihangiro and Kianja)." Some research is necessary to discover that "Mainuka" is none other than a secondary heir, and that Ihangiro and Kianja are chiefdoms. The fact that this law, now reproduced, is more or less practised in Native Courts duly constituted under the Tanganyika Native Courts Ordinance is not made clear.

As for the law itself, it must be accepted at its face value. There is no ready method of proving it except by comparison.

True, the history of the Haya is not unlike that of the Ha to the north-east, and the Fipa to the east of Lake Tanganyika. First a group of clans without much cohesion, then the infiltration of a superior people comparatively few in numbers, who became recognized as the rulers of the clans. Here the parallel between these tribes ceases. It is more than doubtful if the body of law as set out in this volume would be altogether acceptable to the Ha and Fipa. To some other tribes it would be frankly anathema. The reason is not far to seek. The introduction of coffee growing in Bukoba anchors cultivators to the soil and to particular plots. The practice of shifting cultivation ceases. The law of property and inheritance at once assumes a different complexion.

This volume, then, can hardly be called the "customary law" of the Haya, the

¹⁵ *The Customary Law of the Haya Tribe*. By Hans Cory and M. M. Hartnoll. (London: 1945. Percy Lund Humphries & Co. Ltd.) Pp. 299.

"present law" would be a more satisfactory title. Customary law has been modified since the coming of the European and it will continue to be modified for good or ill. The book will be a useful datum from which to measure progress or regress. Moreover, the law has been expounded for administrative officers rather than others. Appendix V, with its list of clans (45 pages of them), can have little interest but for them. In any case it only has an ephemeral interest. Clan heads are apt to die, village names change.

F. LONGLAND.

STUDIES IN POLISH AND COMPARATIVE LAW

THIS collection of essays¹⁶ written by prominent Polish lawyers during their stay in England gives a broad survey of law and legal scholarship in Poland between the two world wars.

Codification, completed and planned to overcome the multifariousness of the Polish legal system, is treated by Dr. Nagorski. Two of its major achievements deserve special mention, namely, the Code of Obligations (1934) and the statutes on Conflict of Laws in the international and the interprovincial sphere (1926). The latter form the subject of a special study by Dr. Kuratowski which brings out clearly the modern character of these enactments. Private law proper is treated by Dr. Alexandrowicz and Mr. Fryde. The former studies the law of marriage, the latter the law of commercial corporations, and both writers employ the comparative method. Polish marriage law is complex owing to the existence of four different systems within the country. The article on commercial corporations deserves special mention, for it shows the strong interrelationship between modern legislations in matters of company law, the similarity of the problems which have arisen in the countries of Europe and America and of the means which have been employed to solve them. Professor Glaser examines the main principles of the Polish Criminal Code (1932), which must rank as one of the most progressive of its era. Professor Kormarnicki's article on recent developments in Polish constitutional law is of special interest since the Constitution of 1935 has given rise to much dispute in the political sphere. It is difficult not to agree with the author that "it expressed tendencies prevailing in certain European countries on the eve of the second World War," for "it enhanced power at the expense of liberty." Nevertheless the author notes "that Polish liberal traditions were so strong that extreme solutions were avoided and no totalitarian system was introduced in Poland." Professor Grodynski and Dr. Bloch contribute informative studies on budget law and labour legislation respectively. Three articles deal with questions of international law. Dr. Poznanski makes a critical examination of the recommendations of the Committee set up by the League of Nations to codify the law relating to Consuls, and offers a number of constructive suggestions. Dr. Moderow's scholarly study is concerned with the revision of treaties. His sober, if negative, conclusions regarding a procedure for carrying out such revisions deserve the attention of all those interested in this subject. Dr. Szurlej discusses the application of the well-known Continental maxim *nullum crimen sine poena* to the punishment of war crimes. Any difficulties which may arise are overcome by the proposal to entrust exclusive jurisdiction to municipal courts administering municipal criminal law.

A view of Polish scholarship in the sixteenth century is provided by Professor Jarra in his article on Andrew Wolan, administrator, philosopher and jurist.

The aim of this symposium to afford the foreign reader a brief view of modern Polish law has been successfully achieved in a short work which combines a great variety of subjects with a mass of factual information.

K. LIPSTEIN.

A NEW BOOK ON INTERNATIONAL LAW

DR. SCHWARZENBERGER's book¹⁷ is on a different footing from the volumes reviewed above, for it is a wholly new work, and is, in addition, written on a different plan from standard English textbooks. The author expresses the conviction that the decisions of International Tribunals constitute more authoritative and persuasive

¹⁶ *Studies in Polish and Comparative Law*. A Symposium of Twelve Articles, with a foreword by Professor H. C. Gutteridge, K.C., LL.D. (London: Stevens. 1945.) Pp. vii and 274.

¹⁷ *International Law*. By G. Schwarzenberger. Vol. I. Pp. xlv and 645. £3.

evidence of International Law than any other, and that the reality of International Law can be made more evident to students by expounding it inductively from the cases. Accordingly, in this first volume, the principles of International Law are stated by reference to decisions and *dicta* found in the judgments of the Permanent Court and the awards of the Permanent Court of Arbitration, supplemented by awards of bilateral Arbitration Tribunals, Mixed Claims Commissions, and Mixed Arbitral Tribunals. At the same time, he recognizes both the incompleteness of such an exposition of International Law, and the need to correct any impression given that International Law is merely a system of case law. The two further volumes of Dr. Schwarzenberger's ambitious project will, therefore, present the principles of International Law as found in British State Practice (Volume II) and in the decisions of the courts of the British Commonwealth and Empire (Volume III).

The above outline of the purpose and scope of Dr. Schwarzenberger's book is enough to show that, if the design be well carried out, we shall have a new contribution to International Law of real importance. For there is no comparable work in England. Moreover, although in English works on International Law there is a liberal sprinkling of references to decisions of courts and tribunals, there is a considerable amount of important material in decisions of these tribunals of which insufficient account is taken. The inductive method that he adopts should, as the author points out, appeal, above all, to English students. Readers of this *Journal* will probably sympathize with his crusading purpose to establish the reality of International Law, by exhibiting its solid foundations in judicial decisions. They will certainly think that Dr. Schwarzenberger has carried out this first part of his project with all the competence to be expected from one whose learned contributions to the literature of International Law are already well known.

Some reservations must, however, now be expressed, even though they may, in part, have their origin in the fact that only one volume of the book is yet available. This reviewer did not find the first volume altogether easy or satisfying. The inductive method, confined as it is in this volume, to decisions of International Tribunals, produces a somewhat scrappy exposition of principle, even in subjects where there are major decisions. Admittedly, the author warns us that, on some subjects, a full exposition will only be found in Volumes II and III, as they have not been adequately considered by International Tribunals. This did not, however, rid the reviewer of the constant feeling that he had been made to leave the table still hungry, after consuming only one of the three regulation courses of the meal. The difficulty springs from the trichotomy deliberately adopted by the author, but it is heightened by the absence of any references, in this volume, to the material to be included in those which will follow. It is recognized that to advance this criticism at the present stage is scarcely fair, because it may, to a greater or lesser extent, be invalidated by the appearance of the remaining volumes. But it is thought unlikely that the criticism will altogether lose its force when the weakness is inherent in the three-fold division of his work adopted by the author. The reviewer is not convinced of the superiority of the method of exposition by division of material sources. The work might have had the same ultimate content, but have been a great deal more satisfying to the average reader, if the subject matter of each title had been handled comprehensively on the basis of all three material sources. Comparison and assessment of all the material would have been easier under such a method, which might also have led Dr. Schwarzenberger to give us more insight into his own critical opinions. It may, however, be conceded that the careful and detailed classification of subjects will facilitate work of comparison if, as is assumed, Dr. Schwarzenberger adheres to the same arrangement of subjects in the remaining volumes. The query has also to be raised whether this book, in its zeal to emphasize the concrete foundations of International Law in judicial and arbitral decisions and in State practice, is not in danger of setting out of perspective the place of writers on International Law as authoritative sources. We can agree with the author that the pronouncements of writers too often differ, according as they reflect the political opinions and interests of their countries, and applaud an approach to International Law which gives precedence to decisions of tribunals. But to discard altogether, as Dr. Schwarzenberger does in this volume, and apparently intends to do in the other volumes, the opinions of writers as sources of Law, is surely premature, if not actually misleading. It may be expected that the opinions of writers will always be a greater source of inspiration for the settlement of rules of International Law than Municipal Law. It is certain that, in the present state of the law, they

must long form one of the principal sources upon which International judges and arbitrators, as well as States, will draw for inspiration. Yet Dr. Schwarzenberger's book, as at present planned, gives virtually no indication of the importance, or even existence, of the literature of International Law; even the footnotes are innocent of references to textbooks or to authoritative articles.

The validity of the method adopted by Dr. Schwarzenberger depends, of course, upon the use for which the book is designed. In so far as it is designed for students, which, from the preface, is plainly the case, the points criticized above are considered to be shortcomings. But the general value and importance of the book is unquestionable, particularly for more advanced students. If it were nothing else, it would be invaluable as a work of classification and reference. But Dr. Schwarzenberger's systematic and skilful handling of the material entitles the book to a higher claim, and it may be regarded as an important contribution to the literature of International Law. It will be essential for libraries, and to all engaged on advanced work. The price, £3 per volume, will be an insuperable obstacle to the average student, who will, however, have in future to be referred to many sections of the book.

The book is arranged in seven parts, entitled the Foundations of International Law, International Personality, State Jurisdiction, Objects of International Law, International Transactions, War and Neutrality and the Law of International Institutions. These parts are divided into forty-six chapters, which in turn have subject titles covering the main fields of International Law. Opinions may differ as to the precise divisions of a treatise on International Law, and the only criticism ventured is that International Torts should be taken out of the part entitled International Transactions, which should be confined to cases with a contractual element. Ten appendices give reports of five leading cases from the Permanent Court, two cases from Arbitral Tribunals and the texts of the Hague Convention I of 1907, the Statute of the Permanent Court and the Rules of the Permanent Court. These appendices are included to enable the reader conveniently to examine specimens of the work of International Tribunals and the documents on which the exercise of their jurisdiction is based. The names of the judges might with advantage be inserted, because the provenance of judges is a point to be borne in mind in reading international decisions.

Detailed criticism of a work of this nature and bulk is impossible, though, naturally, some points occur to the reader. For example, the discussion of certain aspects of the *Eastern Greenland* case in the subject title "Presumptions in Favour of Independent States," seems forced. The discussion of that case, also in the context of prescription, would be more illuminating if some hint were given of the kinds of acts which were held to constitute display of sovereignty. And was it a case of prescription or occupation? Again, the statement on page 458 that the League was an abysmal failure is an unduly harsh condemnation of the conception of the League as a legal institution, though less unfair as a criticism of its major political activities. But, whatever points of criticism there may be in this ambitious work, and whatever view be taken of its plan purely as a method of exposition, there is no doubt that Dr. Schwarzenberger's tremendous labours have produced a book which will be constantly in the hands of those concerned in the study and practice of International Law. The further volumes will be awaited with great interest.

C. H. N. WALDOCK.

LAND TENURE IN THE COLONIES

AMONG the social factors, an appreciation of which is essential to sound colonial development, that of land tenure is of high importance. The impact of Western civilization on primitive societies leads to ever-increasing change in native institutions. In respect of land, the causes are manifold. The introduction of long-lived crops, for instance, alongside the traditional annuals, involves the need for more security: so also does increasing intensity of cultivation, arising from the pressure of increasing cultivation. These are instances of what is occurring for economic reasons. There are other changes due to positive governmental action, whether by laying down the manner in which land may be held or by legislation controlling the use of land, e.g., by restricting transfer of mortgage or by requiring cultural practices in order to preserve its fertility. The range of state activity will undoubtedly increase, directed towards the joint ends of providing a sound basis for development and of ensuring the fullest security for the economic advance of the indigenous peoples. Such

positive policies must rest on knowledge of the nature of and changes in traditional tenures, not only in an individual territory, but over the Colonial Empire generally, since the problem is one, whatever its local manifestations.

Dr. Meek¹⁸ has set himself the task of collating and synthesising the available information. His work is in one sense only an introduction, since the specialist studies available are limited in number—many must be buried in Government files—and are also steadily increasing: but, as an anthropologist, he has found sufficient material to enable him to provide two valuable general chapters on native systems of tenure and on changes in native land law. Most of the book consists of a series of studies of the position in a number of the Colonial possessions. Fifteen of these, mainly in Africa, are considered separately, while a further chapter summarizes conditions in the West Indian possessions. The treatment of each territory is not uniform, but the typical scheme is a brief historical review, followed by a statement of the enacted land law and the principles leading up to it, while set beside these there is an account of known native systems of tenure and of the changes which are taking place. He draws attention, at a number of points, to the powers of subsidiary legislation which are enjoyed by Native Authorities. The comparative value of the studies of the African Colonies would have been enhanced if the scope of the book had allowed of further chapters on Southern Rhodesia, the Union of South Africa and the High Commission Territories of Basutoland, Bechuanaland and Swaziland, though reference is made to some of them in the general chapters. A further chapter treats of the relationship of Muhammadan law to problems of land tenure.

The subject-matter of the book is not confined to native land tenure. It covers also that of immigrant peoples, and two chapters are devoted to a comparison of the merits of freehold and of leasehold tenure and to the system of revisable rents. In the former of these he finds that "the whole weight of agricultural opinion is directly opposed to the freehold principle, that modern political and economic theory is consistently in favour of the increasing control of land by the State, and that British colonial governments are becoming more and more committed to the leasehold system." The system of revisable rents is linked with this theory, in that it enables the State to exercise thereby its right to participate in increased values of land.

The remaining chapters of the book treat of two particular aspects of native land tenure. The one covers the pledging and mortgaging of land, and their implications for agricultural debt and the security of the individual and the community. The other concerns land titles and registration, and in it the author sounds the double warning that problems may arise from a system which does not make provision for future changes and, on the other hand, from going beyond what present conditions require. He makes an important point, that of the necessity for simplicity and cheapness, and he advocates a much greater degree of uniformity of system throughout the Colonial Empire.

Dr. Meek has provided a valuable and readable book, which fully justifies the hope, expressed in his preface, that it will be useful not only to officials but also to specialist students and to those interested in general colonial welfare. The underlying theme is the necessity for colonial governments to give the closest attention to the evolution of sound systems of land tenure, and this is further stressed in Lord Hailey's introduction to the book.

R. DE Z. HALL.

LAW IN THE MAKING

THE description of this book¹⁹ by a previous reviewer in this *Journal* as "admirable and delightful" is not exaggerated. It is not only a classic, but a classic which will long continue to be read. The re-issue, which its popularity necessitates, must, in spite of the author's hesitation, be called a fourth edition, because it contains supplementary notes, inserted to a small extent in the body of the book where this could be done without disturbing the pagination, and to a larger extent in twenty pages of appendix.

The preface is dated March 30, 1946, almost exactly seven years later than that

¹⁸ *Land Law and Custom in the Colonies*. By C. K. Meek. (1946. Oxford University Press: Geoffrey Cumberlege.) Pp. xxvi, 336. 21/-.

¹⁹ *Law in the Making*. By Dr. C. K. Allen, 4th Edition. (1946. Oxford University Press: Geoffrey Cumberlege.) Pp. xxxi, 564. 21s.

of the third edition. The additional notes are concerned with judicial comment in the intervening period relevant to the subject-matter of the book. For instance, there is a full note on *Young v. British Aeroplane Co.*, 1944, K.B., 718, in which Lord Greene, M.R., delivering judgment on behalf of himself and five Lords Justices, affirmed that the Court of Appeal, even if all its members are sitting, is bound to follow a previous decision though given by fewer members sitting as a division of the Court. Dr. Allen, after examining the exceptions to the proposition, concludes that the practice of the Court of Appeal will in all probability be as heretofore. "The Court will follow its own previous decisions, and those of the House of Lords, when they are plainly 'on all fours,' but when it finds (as it constantly does) conflict of authority and intricacies of interpretation, it will adopt what it believes to be the most correct exposition of the Law; and if previous decisions present obstacles to that consummation it will not be lacking in astuteness to distinguish them out of the way."

How unsatisfactory the result is appears from Professor Goodhart's article in the *Cambridge Law Journal*, 1947.

It is cheering to read that Dr. Allen, whose public utterances are not in general biased in favour of the State, lends his weighty support to the dissenting opinion which Professor Goodhart, his successor in the Oxford Chair of Jurisprudence, appended to the report of the Committee on Law Reporting (1940). That *vis inertiae* paralyses men of consummate ability as well as ordinary folk is abundantly demonstrated by the conclusions of that Committee, all the members of which, except Professor Goodhart, rejected the latter's common sense proposal that official shorthand writers should take down all judgments of courts of record and that the transcripts, after revision by the judges, should be filed in the central office, and indexed. Foreign readers of this *Journal* must wonder whether Alice's adventures were in truth in England and not in Wonderland when they realize that under our legal system all judgments of the higher courts are in some measure binding upon courts trying similar cases thereafter at first instance, and yet that the State undertakes no responsibility for making judgments cognoscible, but relies on the public spirit of the legal profession, and on the profit motive of newspaper proprietors, as incentives to make reports of decisions available to lawyers. With what deplorable consequences Dr. Allen shows by his enumeration of cases in which in the last ten years a wrong decision has been given because counsel and judge were unavoidably ignorant of a precedent either unreported or not reported in any of the more accessible publications.

H. A. H.

PRINCIPLES OF INCOME TAXATION²⁰

It is well known that the Income Tax Acts of the United Kingdom nowhere define the term "income"; sources of income are enunciated and methods of computing income therefrom prescribed, but, as Lord Macmillan said in *Van den Berghs, Ltd., v. Clark* [1945] A.C. 431, 439, "What constitutes income they (the Acts) discreetly refrain from saying." Similarly in the Commonwealth of Australia the Income Tax Assessment Act does not delimit the expression "income," but charges as "income" certain specified types of receipts.

Mr. Hannen considers that there are certain essential principles of income taxation which are independent of any legislative enactments, and he has endeavoured in his work to deduce from the decisions of the Courts both in this country and in Australia the basic principles which determine, firstly, the nature of income and, secondly, the real cost of earning income. Only those tax cases have been considered by him which have really turned on these "general principles" and not upon express statutory provisions, though the latter have been examined where they seem to exemplify such principles.

The learned author deduces from the cases decided in these two countries, and by the Judicial Committee of the Privy Council under the Indian Income Tax Acts, two vital principles which he considers can be applied to any Act taxing "income" but omitting to define this term. These principles would, of course, be subject in practice to any express statutory provisions such as, for example, those which deem

²⁰ *Principles of Income Taxation*. By J. P. Hannen, LL.B., Barrister and Solicitor of the Supreme Court of Victoria; Member of the Commonwealth Taxation Board of Review, Sydney, N.S.W., 1946. (Australia: Law Book Co. of Australasia Pty. Ltd., 1946.) Pp. xxxii, 505. £2 10s.

certain receipts to be "income" and taxable as such though they are not so in fact, cf. s. 37 Income Tax Act, 1945, which charges to income tax the *capital* sums received for the sale of patent rights.

The first principle enunciated by Mr. Hannen determines what receipts may properly be regarded as income and is stated by him thus: "What receipts are to be treated as 'income' must be determined by the *ordinary usages and concepts of mankind*." In Part I of his book, Mr. Hannen traces the development of this principle, and, in the course of twenty-two chapters, considers its application to the many and varied types of receipts comprised under such generic headings as "Rewards for Personal Services" and "Returns from Invested Capital," &c. The chapters (Nos. 14, 18 and 19) devoted to "Realisation" and "Compensation" transactions are particularly valuable and require to be read in conjunction with ch. 21—"Capitalisation"—for in them Mr. Hannen deduces the general principles applicable to the taxation of *lump-sum* receipts. "Capitalisation," he points out, is the act of converting what would be income into what is capital and looks only to the future and not to the past, that is to say, it operates only upon a *right to future income*; by the application of this principle he resolves the differing *rationes decidendi* that have been applied by the Courts to elucidate the true nature of lump sum receipts, that is whether they are to be regarded as of an "income" or of a "capital" nature.

The second principle propounded by Mr. Hannen relates to the computation of the net income to be assessed and is stated by him in the form of a "Fundamental Rule," thus: "In the calculation of income to be taxed, no deduction is allowable unless it represents a loss or outgoing incurred in the course of operations devoted to the production of income." In Part II of his work, the author applies this principle, in the light of the decisions of the Courts, to various types of losses and outgoings, with special reference to the question of "capital expenditure." Mr. Hannen shows, too, how the *general* provisions of the Imperial and Commonwealth Income Tax Acts rest upon and embody this "Fundamental Rule." It is interesting to compare his proposed rule with the well-known, and by now authoritative, *dictum* of Lord Davey in *Strong and Co. v. Woodfield* [1906] A.C. 448, 453: "It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. *It must be made for the purpose of earning the profits.*"

In the course of six chapters (Nos. 26 to 31) Mr. Hannen considers the various tests that have been suggested for "Capital Expenditure" and—rightly rejecting accountancy standards as conclusive (cf. Uthwatt L.J. in *Bean v. Doncaster Amalgamated Collieries, Ltd.* (1944) 2 All. E.R. 279)—selects as the most satisfactory the oft-approved *dictum* of Lord Cave L.C. in *Atherton v. British Insulated and Helsby Cables, Ltd.* [1926] A.C. 205, 213: "But when an expenditure is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think there is a very good reason . . . for treating such expenditure as properly attributable not to revenue but to capital."

Though based upon decisions of the British and Australian courts, the principles enunciated by the learned author are considered by him to be of general application; see the Preface and remarks at page 280. This brings your reviewer to what he considers is a serious defect in Mr. Hannen's work, namely, his omission to discuss two striking differences between the American and British concepts of "income" which are in other respects not dissimilar. Mr. Hannen on two occasions—cf. pp. 6 and 280—states as obvious beyond doubt that "capital" receipts are not "income," resting his views, it must be presumed, upon his first principle of "the ordinary usages and concepts of mankind." In America, however, the Supreme Court has held that the term "income" can embrace the profit made on the sale of a capital asset, cf., *Eisner v. Macomber* (1920) 252 U.S. 189: "Income may be defined as the gain derived from capital, from labour or from both combined, *provided* it be understood to include profit from the sale or conversion of a capital asset." Again in considering the "Taxable Quantum," Mr. Hannen states—almost as though it were a law of nature—that: "The wastage or depreciation of a capital asset is *unquestionably* a capital loss, and for income tax purposes a loss of capital cannot be regarded as a real cost of earning income," cf. page 281. But in America it has been laid down by the Supreme Court that the concept of income inevitably embraces the idea of an allowance for the exhaustion of capital, cf. *Doyle v. Mitchell Bros.* (1918) 274

U.S. 179: "In order to determine whether there has been a gain or loss and the amount of the gain, we must withdraw from the gross proceeds *an amount sufficient to restore the capital value* that existed at the commencement of the period under review."

Since the term "income" is not defined in the Statutes implementing the XVth Amendment of the Constitution of the United States by which the federal taxation of income was made constitutional, the courts in that country have equally had to evolve an adequate conception of the meaning of the term "income." If the American courts have been enabled to deduce a concept of "income" that is in those two respects so strikingly at variance with that developed by the courts of Great Britain and Australia, it is difficult to see what validity any principle based on the "ordinary usages and concepts of *mankind*" can have. In these circumstances it might be thought that Mr. Hannen's work is not of very considerable value inasmuch as the first principle laid down by him seems absolutely dependent upon this "universal" idea. Such is, however, far from being the case for these so-called "principles"—and the following comment applies particularly to Part I of the work—seem, in effect, to be mere connecting links which have enabled the author to write a scholarly commentary upon those tax cases which have dealt with "general principles" as contrasted with the detailed interpretation of statutory provisions. The work is, moreover—as Mr. Hannen rightly states—"fundamentally different from an annotation" of the tax cases, for in it he has expounded and exemplified many of those unexpressed principles which the British Courts have held to lie behind the scheme of the Income Tax Acts.

The work is so thorough and so detailed in its examination and discussion of the cases that, in the result, the principles propounded by Mr. Hannen are far too often lost sight of. It might, indeed, be said that the subject-matter of the book could be better termed "The *Common Law* of Income Taxation," that is the law applied by the Courts where express statutory provision is lacking or where phrases are employed in the Acts in such general and undefined terms that the Courts have been forced to extract the principles inherent in such expressions; for instance, "carrying on a trade," "residence," "capital" and the like. Mr. Hannen's exposition of this "Common Law" is masterly, while his knowledge of both British and Australian tax cases is clearly profound.

Despite his criticism of the theories put forward by Mr. Hannen, your reviewer can thoroughly recommend the work to any practitioner—either in Great Britain and in Australia—who is engaged in this most abstruse branch of the law, for he will find therein every decision of the British and Commonwealth courts which has turned upon "general principles," often with shrewd comments by the author. The book is well arranged, and the titles of the several chapters speak for themselves; the method of sub-dividing the matter contained in each chapter into clear divisions by headed headings is an added advantage. The Table of Cases is fully adequate and the Index ample and exhaustive.

A. FARNSWORTH.

Vergleichende Rechtslehre. By Adolph E. Schnitzer. (Basle: Verlag für Recht und Gesellschaft A.G., 1945.) Pp. xii, 497.

Not for the first time has the legal world been able to witness a revival of interest in comparative legal studies in the wake of a great war. But while after the first World War it was the vanquished, above all, who devoted themselves to the study of comparative law in order to meet the victors in the courts and at the conference table, victors and neutrals are the protagonists of this branch of studies to-day, realizing that the world is drawing closer. In England Professor Gutteridge has studied problems of method which confront the student of comparative law. Dr. Schnitzer has carried out a much more ambitious plan, which includes three main complexes of questions. First, he has studied the place of comparative law in relation to other branches of law. He stresses rightly that comparative law is a method rather than a separate branch of law, and underlines its value not only for the purposes of law reform and unification, but also for the better understanding of municipal law.

Second, he has written a survey of the world's legal systems which combines the features of similar attempts by Wigmore and by the editors of the first volume of the *Rechtsvergleichende Handwörterbuch*. This enormous task has been carried out successfully on the whole. In this part the author discusses the history and

chief characteristics of the laws of primitive peoples of the ancient world, of modern continental and of Anglo-American law, of religious laws and the laws of Asiatic and certain African communities. It is clear that this survey, which shows the wide range of the author's knowledge, must necessarily be somewhat cursory in view of the limits set by the arrangement of the book, and it cannot be denied that some aspects of legal development have been telescoped for the sake of conciseness to an extent that threatens to blur the picture. Thus the sections on Roman law, on the sources of English law, in particular the observations on Vacarius, have suffered from compression. The author is aware that all divisions of the world's legal systems must be arbitrary, but on the whole the division adopted in the present book is acceptable, except where systems of religious law are concerned, for these operate to-day in close connection with rules of law enacted by the civil authorities. Writing in a neutral state while the war was raging, the author has had the opportunity, denied to the belligerents, to watch legal developments in all parts of the world. His book provides, therefore, in addition, a convenient refresher course for those who have been unable to acquaint themselves directly with, for example, the Italian Civil Code of 1942, or the legislative reforms in France during the war.

The third part of the book offers a systematic comparison of the main legal institutions. The law of persons, family law, contract and tort, succession and the principal features of commercial law are studied on lines similar to those adopted in the *Rechtsvergleichende Handwörterbuch*, but the account is more up to date, and the author was able to employ a more personal and critical approach. This part is probably of the greatest interest to the comparative lawyer who wishes to obtain information on a question of private law. The reader is impressed by the author's range of reading, his detailed knowledge of the principal legal systems of the continent and his ability to marshal those systems of law with which he is less familiar. Confronted with a monument of learning such as this the reviewer hesitates to point out minor inaccuracies, but in a second edition the following points may require reconsideration. When discussing the English legal system (pp. 197/8) the author speaks of the High Court when he must have had the Supreme Court of Judicature in mind. The observations on heirship (p. 363) and the rule against perpetuities (p. 385) need amplification; those on dower (p. 372), the terce and the *jus relicta* should be modified. A notable omission is a discussion of Bills of Sale in English law. For Boarding Office (p. 469) read Board of Trade. The work is a handbook rather than a monograph or an introduction to comparative law, but as a handbook it is without rivals.

K. LIPSTEIN.

ΑΝΑΣΚΟΠΗΣΙΣ ΤΗΣ ΕΠΙ ΤΟΥ ΙΔΙΩΤΙΚΟΥ ΔΙΕΘΝΟΥΣ ΔΙΚΑΙΟΥ ΝΟΜΟΛΟΓΙΑΣ ΤΟΥ
ΕΤΟΥΣ 1941 ὑΠΟ ΠΕΤΡΟΥ Γ. ΒΑΛΛΙΝΔΑΣ

In this essay of 25 pages²¹ Professor Vallindas has collected the decisions of Greek courts in matters of private international law during the year 1941 and has provided them with a critical commentary. There are altogether 12 decisions given by Courts of First Instance, Courts of Appeal and the Areopagos. They deal with such varied questions as double nationality, the effect upon a contract of employment governed by Greek law of prohibitions under Palestinian law which rendered the object illegal for which the employment was entered into (cf. *Foster v. Driscoll* [1929] 1 K.B. 470), the law governing collective labour contracts and the obligation to provide a *dos*. Others are concerned with the problem what law governs capacity to take under a will, the immunity from execution of property owned by foreign states, the recognition in Greece of foreign decrees of divorce and the enforcement of foreign judgments.

The comments appended by Professor Vallindas are always useful and of high quality. They show that Greek practice in matters of Private International Law is very ready to consider foreign doctrines and has been much influenced by Italian and German ideas of the period up to 1933. Thus the picture emerges of a practice which is truly cosmopolitan in character.

K. L.

²¹ (*La Jurisprudence Hellénique en matière de Droit International Privé en 1941*.) Extract from the *Archeion Idiotikou Dikaïou*. Vol. 8. (1942.) P.325ff.

A BRAZILIAN TREATISE ON INTERNATIONAL LAW

SENHOR ACCIOLY's *Treatise on Public International Law*²² which was first published in 1933 in Portuguese has now been made accessible to a wider public by the publication of an edition in the Spanish language; in this edition the material is brought up to date to the end of 1944. One must be grateful to the author for having arranged this new version of his work as Spanish is understood by a far wider circle of readers than Portuguese. There can be no doubt that this work, which is representative of the best in contemporary South American legal achievements well deserves the attention of international lawyers far beyond the borders of Brazil.

Senhor Accioly is a distinguished and experienced diplomatist and practitioner of international law. He appreciates the interest of purely theoretical questions and gives a brief and lucid account of the jurisprudential and historical aspects of international law, but it is obvious that he regards the more practical aspects of his subject as far more attractive. After a short introduction he gives a detailed account of the modern doctrine of public international law, with special emphasis upon the South American and particularly the Brazilian interpretation. He follows the traditional system. On disputed points he is generally inclined to adopt a reasonable compromise between the various different views, but he states opposing views fully. Nearly everywhere he gives the arguments for his own solution with great clearness and conciseness. His ambition has not been to present a new "system," an original "theory" or a number of novel interpretations. He has endeavoured to set forth the views adopted by the Government of his country within the traditional framework of a system of international law and in this endeavour he has been eminently successful. Cases are set forth with sufficient detail to attract the reader and enable him to form his own opinion, without being overloaded with unnecessary detail. The style of the book is everywhere attractive and partly even elegant. The arrangement is throughout logical, without ever being pedantic. To read some of the more topical chapters, such as that on responsibility of states, is not merely profitable, but an æsthetic pleasure.

Since Clovis Bevilacqua's two-volume *Treatise on Public International Law* of 1911 there has been no large-size Brazilian work on this subject. Senhor Accioly's detailed account of the attitude taken in the past by the Brazilian Government to the various questions of public international law is therefore necessarily of great practical importance. It remains, however, regrettable that the date of the appearance of this book has had a rather unfortunate influence upon its contents. The work was completed before the recent re-organization of international society had even begun to take shape. It contains an accurate and detailed account of the League of Nations, but, though the Charter of the United Nations is reprinted in an appendix, the author has not been able to deal with it in his text. Problems of the second world war are often only lightly touched on. Such aspects as the Nuremberg judgment, UNESCO, the I.R.O., the military occupation of Germany, Austria and Japan and many others could not yet be taken into account. Sometimes the reader who has followed the author's careful statement of the development of a problem from antiquity to recent times is confronted with the really tantalising fact that the story breaks off in the very moment in which it might touch upon one of the most widely discussed problems of modern times. One might well suggest to the author that he should seriously consider supplementing his work by a fourth volume that would bring it up to date to the present time. Several years at least will pass before another edition will be possible. Senhor Accioly's readers will want to have the guidance of his experienced hands before the expiration of that period.

It is not possible within the framework of a brief review to enter into a discussion of any of the thousands of points of detail upon which the author has let us have the benefit of his views. He has everywhere carefully considered the views of other text-book writers, South American, North American, British and European Continental, including the more important international legal periodicals, though war conditions seem to have prevented him from gaining access to at least some of the large monographs of the last ten years. There are quite a number of cases where one is left wondering whether his views might not have been modified by a study of some of this material. It must, however, be pointed out that Senhor Accioly nowhere appears unduly biased in favour of the views of his own Government. He retains

²² *Tratado de Derecho Internacional Publico*. Tomo I, II, III. By Hildebrando Accioly. (Rio de Janeiro: Imprensa Nacional, 1946.)

his freedom of thought and on more than one occasion dissociates himself from views adopted by Brazilian official agencies.

It is, of course, of paramount interest to European readers to observe the attitude which Senhor Accioly takes to the more hotly disputed topical questions of the moment. Senhor Accioly has the advantage, in some of the questions involved, to live in a country which is less directly concerned with some of these problems. Such detachment results in greater impartiality. It is reassuring to notice that he is satisfied that the British attitude in the *Altmark* incident was fully justified. His arguments are much the same as those of Dr. Bisschop's (*Transactions of the Grotius Society*, vol. 24 pp. 67ff.), a fact that is all the more remarkable, as Dr. Bisschop's essay seems to have escaped his attention. Even more interesting is his attitude to another problem that has recently created a considerable stir in Germany. In that country it has been argued with considerable vehemence, both in scientific writings (see e.g. Rudolf Laun, *Die Haager Landkriegsordnung* (1946) pp. 56ff.) and in speeches by responsible statesmen, as e.g. the Minister-President of North-Rhine-Westphalia, Dr. Amelunxen, that the Allies had in introducing various rules of Military Government legislation committed violations of the Hague Convention on Land Warfare. Senhor Accioly could not be aware of this controversy, because at the time when he completed his manuscript, it had not yet developed. But his attitude to it is made clear by his remark that the Hague Convention applied to belligerent occupation only and that the modern doctrine has learned to distinguish between the latter and an occupation that followed upon a complete *debellatio*. That the present war in the case of Germany ended with a *debellatio* is according to him not disputable (vol. 3, p. 467, note 2). In this respect there is, according to Senhor Accioly, a great difference between the present occupation of Germany by the Allies and the occupation of Poland by Germany, for, as Senhor Accioly rightly says (vol. 3, p. 178): "Germany did not expect that the war would be terminated in consequence of the annexation of Poland." This was therefore a mere case of belligerent occupation to which the rules of the Hague Convention should have been applied.

Even more interesting are perhaps the author's accounts of cases and incidents in international legal relations in South America on which so far no reports of any kind have been published. The cases relating to double nationality in Brazil are an example of this aspect of Senhor Accioly's work (vol. 1, pp. 572 ff.). Thus in 1936 the German language newspaper in Brazil carried an advertisement which purported to call up for military service all Germans in the age groups 1914-1936 residing in Brazil, even though born in that country. It could, of course, not escape the attention of the Nazi Government that the *jus soli* applies in Brazil and that they were therefore in fact calling up for military service in Germany persons who were not only residing in Brazil but who were Brazilian nationals. The note, sent by the Brazilian Government to the German Embassy, is distinguished by the dignity and firmness of the Brazilian Government's attitude.

I may be permitted to add that the work is particularly well printed and indexed. A special case index is provided so that this compendious treatise is made much more easily accessible to foreign readers than many other shorter contemporary works on public international law published in civil-law countries.

E. J. COHN.

La Responsabilité du Fait des Choses Inanimées, au Liban et dans les pays du Proche-Orient. Etude de droit comparé par Albert Sara, Docteur en Droit. (Paris: Librairie Générale de Droit et de Jurisprudence.) Pp. 212.

This book is numbered 44 in the series of Studies in Comparative Law, published under the auspices of the Institute of Comparative Law at Lyons. In 1932 a *Code des Obligations et des Contrats* was promulgated in the Lebanon, superseding the Ottoman Codes, and, as might be expected, modelled on the Civil law of France. The articles regulating the law of *Delicts* reproduce, with certain modifications and amplifications, Arts. 1382-86 of the French Code. The greater part of this book is occupied with a detailed discussion of the significance of these modifications, and an interesting comparison with the current French law, Art. 131 of the Lebanese Code, in particular, adopts fully the principle of "*responsabilité objective*" as regards damage done by "*choses inanimées*"; the "*gardien*" is absolutely responsible, even though the *chose* was not at the critical time "*effectivement sous sa conduite, son contrôle ou sa direction*". Proof of *force majeure* or of *faute de la victime* is the only defence available. M. Sara considers, with a care which should

make his work of value in the Lebanese courts, the heads of responsibility under this and the associated articles; the range of responsibility is obviously very wide, in English eyes somewhat startling. But the doctrine of the *risque créé, risque profit*, has been the subject of endless discussion in the French courts and French legal literature for the past generation. French *jurisprudence*, notably by the decision of the *Cour de Cassation, toutes Chambres réunies* in 1930, has come very near to accepting the principle of the *risque créé*, though M. Sara is of opinion that the presumption of responsibility for damage done by inanimate things there adopted is not, at least theoretically, to be equated with the statutory *responsabilité objective* declared by the Lebanese Code.

Nor, of course, is the notion that liability for damage may be independent of fault foreign to our own law; *Rylands v. Fletcher* decided some eighty years ago, is though its scope is limited, surely a harbinger of a definite change of orientation in these matters. The Workmen's Compensation Acts are clearly in the same line of advance, and M. Sara not unnaturally refers to the legislation of this kind in connection with his study of the law in the various territories with which he deals.

Within the scope envisaged M. Sara's work is informative and, granted the lack of much material, complete. But as a study in Comparative Law in a wider sense, outside the circle of French legal interests, it is of limited value. A comparison with such another living body of law as the English or American would make a more scientifically profitable study. Such, of course, was not within the scope of M. Sara's intention, nor, to judge by the single reference made to the Common Law, is the author's information upon this subject adequate. The book does indeed comprise a section dealing with Egypt, but the law of that country in this matter is but a hasty abridgment of the articles in the French Code and is of little interest save in comparison with its original. Another brief section treats of the Swiss-inspired Turkish law. There remain Syria, Palestine and Iraq, and what is said of these is applicable also to Trans-Jordan. In all these territories the Moslem law is in force in the form of the old Ottoman Civil Code, the *Mejelle*. M. Sara devotes consequently some pages to an exposition of the Moslem law of *delicts*, taking as his authority the admirable writings of M. Tyan. But it is difficult and perhaps waste labour to seek to make serious comparison with the Moslem law under this head. The material for effective comparison is lacking. The *dicta* and illustrations of early Moslem jurists are interesting and illuminating so far as they exhibit the ideas of a long past legal epoch, but they do not give to us a reasoned body of law with which a profitable comparison may be made. And though the *Mejelle* is still the law in these countries, yet in fact actions for civil damage are rare, and reports of such cases still rarer. The judges, in Syria and Palestine at least, are inspired by other principles than those deducible from the Sacred Law and, if they refer at all to the Code, are likely to do so only to twist its original meaning into some direction consonant with modern juristic theory. M. Sara welcomes the tendency in Syria to adopt this method of interpretation, if it can be called interpretation at all, provided that out of the dead ashes of the Moslem law a new body of French-inspired law may be thus made, phoenix-like, to arise. He points out that the modern French law of *delicts* is the outcome in great part of an interpretation of the French Civil Code which would have startled its compilers. One may surmise that the common law of torts as to-day administered would have been equally strange to Mr. Justice Blackstone.

F. M. G.

L'EGYPTE CONTEMPORAINE

RECENT numbers of *L'Egypte Contemporaine* are mainly devoted to financial, economic and statistical questions; the issues of 1946 contain but one purely legal article, that of Dr. Ahmed Moussa on Responsibility of the State for damage occasioned by riots.²³ Dr. Moussa styles his article "A Study in Comparative Law," but save for a misleading footnote, quoting a reference to English law from a French text-book, the

²³ The issues of 1945 also contain articles almost exclusively of economic or financial interest. But Nos. 221-222 (December, 1944) are entirely devoted to an exhaustive study by Dr. Hassan Garrana of the use and possible abuse of the powers possessed by the Egyptian Government to issue Regulations. This is to-day a matter of very vital interest and Dr. Garrana's historical and critical study is well worth attention. Reference may also be made to articles on the same subject by M. Gamil Chalom in *Gaz. Trib. Mixt.* xxix, pp. 241-49; 278-80.

comparison concerns solely the two closely allied bodies of French and Egyptian law. Though thus limited, it is useful and suggestive. That a local group, hundred, village or town may be communally treated as responsible for injuries arising from civic disorders in its midst is a long established rule, whatever may be its theoretical justification. In England it finds its modern expression in the Riot (Damages) Act, 1886. In France a law of 1914, quoted by Dr. Moussa, throws upon the Communes and the State a certain civil responsibility for damage to property or person resulting from "*émeutes ou troubles publics*."

Approached, however, from the Tort rather than from the Crime angle, it is arguable that the State, in certain cases at least, might be regarded as responsible for the neglect or folly of its agents in failing to take reasonable precautions against civic outbreaks from which damage has resulted. The French Administrative Courts (Conseil d'Etat) have, as Dr. Moussa seeks to show, manifested a certain willingness to accept State responsibility for fault on the part of officials in connection with the carrying out of acts of authority (*actes de puissance publique*). In Egypt there are no Administrative Courts and no Riot Damages Act. But the Mixed Courts have, increasingly in recent years, held the State responsible for damage done in a riot where a "*faute de service*" can be attributed to its servants. Dr. Moussa cites instances of this "*jurisprudence*." Such instances are numerous. Thus, to go outside Dr. Moussa's article, in *Xanthakis v. Government of Egypt*,²⁴ the Second Chamber of the Mixed Court of Appeal declared as follows: "*Attendu que les appelants reconnaissent avec la jurisprudence de cette cour, qu'à défaut d'une loi spéciale sur la matière l'Etat Egyptien n'est responsable des dommages subis par les particuliers en cas d'émeute, que si le fait dommageable est dû à une faute d'action ou d'omission, précise et grave, imputable aux agents de police chargés de la répression des désordres et du rétablissement de l'ordre public.*" The doctrine is clear. In this particular case, the Court was of opinion that the evidence did not prove such fault on the part of the police.

F. M. G.

REVUE EGYPTIENNE DE DROIT INTERNATIONAL

THE second issue of this *Review* is a substantial volume in French and Arabic containing articles, international documents, such as the Atlantic Charter, the British Treaty with Trans-Jordan and the Bretton Woods Agreement, a Review of Reviews, mainly French and American, Summaries of Judgments of the Nuremberg Tribunal, Abstracts of Egyptian Legislation bearing on international affairs 1936-46, and of a few Egyptian decisions. There is, therefore, ample material for all tastes. Two of the articles are concerned with the union of Arab States, but the remainder have a wider appeal. Dr. Nassif, of the French School of Law at Beyrout, writes on "*Mandate or Trusteeship*," and seeks to make clear the somewhat subtle distinction in import and practice between these two methods of international action. In his opinion, Trusteeship is international in a sense in which Mandate was not. "In general," he remarks, "Trusteeship better corresponds with the new tendencies evoked by the War. Under the influence of the United States and the Soviet Republic, seeking the liberty of peoples now in a condition of colonial subordination, the idea of "*colonisation*" is now in course of development (*en train d'évoluer*). In place of a scheme which ensured subordination to the advantage of a particular nation in the general interests of civilization, we have one which aims at international control (*substitue une nouvelle formale de contrôle internationale*)."²⁵ Possibly Dr. Nassif's trust in the value of internationalization—if this be a mark of trusteeship—is somewhat naïve, but it must be admitted that the mandatory system has not given all the satisfaction which it was expected to afford.

Another article of value deals with *Le Problème de Détroits*, a matter of living interest at the present moment on several counts. The writer, Judge Rifaat of the Mixed Courts, holds the view that "free navigation of straits is the international rule, restriction is a matter of exception." Most definitely is this the case where the strait unites two open seas. Nevertheless, we have to acknowledge that, in fact, the navigation of the most important straits and sea passages has been and is the subject of special treaty provisions. Historically and politically the Bosphorus and the Dardanelles furnish the most striking example, and Judge Rifaat traces the history of the *régime de détroits turcs* in a survey of treaty provisions from

²⁴ *Gaz. Trib. Mixt.* xxix, No. 457 (10th) March, 1938.

Koutchouc-Kainardje 1774 to Montreux. The ideal in view is that of international control. *C'est le classement de ces détroits du Bosphore et des Dardanelles, de même que les autres voies de communications semblables, dans le domaine public international, sur une base normative uniforme, avec des règlements techniques locaux et sous l'autorité d'organismes ou commissions internationales, armés d'un pouvoir de contrôle et des moyens d'exécution et de police effectifs.* Joint harmonious international action is unhappily less easy to obtain to-day than it was early in the century, but hopefulness in this sphere appears to be strong in Egypt. Meanwhile, we can congratulate the Egyptian Society of International Law on their useful and well documented publication.

F. M. G.

The following publications have also been received²⁵:—

Aiyar, K. V. Krishnaswami. *The Single Transferable Vote*. (Trivandrum: Higginbothams, 1946.) Pp. 99.

This little book is an exposition of the system of proportional representation by a well-known member of the Madras Bar.

Arninjou, P. *Precis de Droit international privé*. (Paris: Librairie Dalloz, 1947.) Pp. 461.

Australian Legislative Digest, 1939-1941, 1942-1944. (Sydney: Government Printer, 1946.)

Baalman, John. *Outline of Law in Australia*. (Law Book Co. of Australasia Pty., Ltd., 1947.) Pp. vii, 360.

Mr. Baalman's aim has been to provide a book on elementary law which is not merely a primer for law students, but also for the general reader. It is designed to be a compendium on modern law with an historical background, using detail only so far as it was considered necessary to illustrate some fundamental rule or principle. The book demonstrates the historical continuity from the earliest days of English law to the latest developments of Australian law. Here and there are interesting variations between the English and Australian law at the present time and of course there are differences due to the conditions of life in the two countries. For example, it has been left to the Courts in Western Australia to decide that camels are domestic animals, but on the whole the similarity rather than the divergence between the two is the notable characteristic of this little book.

Barbados Laws. 6 Volumes, 1894-1944. (Barbados: Advocate Co., Ltd., 1944.) £7.

Carlston, Kenneth S. *The Process of International Arbitration*. (Columbia University Press: Geoffrey Cumberlege, 1946.) Pp. xiv, 318. 25s.

Cheshire, G. C. *Private International Law*. (Oxford University Press: Geoffrey Cumberlege, 1947.) Pp. lii, 884. 35s.

Clagett, Helen R. *A Guide to the Law and Legal Literature of Bolivia*. (Washington: Library of Congress, 1947.) Pp. viii, 110. 55c. *A Guide to the Law and Legal Literature of Paraguay*. (Washington: Library of Congress, 1947.) Pp. vi, 59. 25c. *A Guide to the Law and Legal Literature of Peru*. (Washington: Library of Congress, 1947.) Pp. vii, 188. \$1.00.

The series of Guides to the Law and Legal Literature have been extended to include Bolivia and Paraguay, for which Mrs. Helen Clagett is responsible. They have been prepared on the same plan as the preceding volumes, which gave an historical background as the basis for the bibliographical material. The International Law Section in the volume relating to Bolivia is largely composed of works about boundary disputes which have occupied the country throughout its entire history. Paraguay has been involved in a similar difficulty, though the literature on the subject has not reached the same dimensions. The volume on Peru follows the usual plan of the series.

It can only be said of these volumes that they maintain the standard so ably established by the late Mr. J. T. Vance.

Cobbett, Pitt. *Cases on International Law*. Sixth Edition, Vol. 1, Peace. By Walker, Wyndham Legh. (London: Sweet & Maxwell, Ltd., 1947.) Pp. xx, 416. £1 17s. 6d.

Columbia University. *Report of the Acting President, for 1946*. (Columbia Univ. Press, 1947.) Pp. 74.

²⁵ Mention here does not preclude review later.

Current Law Index. (London: Sweet & Maxwell.) Annual subscription 2 guineas.

This is a monthly index to the different series of Law Reports, legal newspapers, Acts of Parliament and the Statutory Rules and Orders. It is a convenient little reference work to have at hand and the parts consolidated into a volume will form a useful series. It might be worth while perhaps to increase the cross-references as a case involving diplomatic privilege might not be remembered as one relating to "sub-letting" (see para. 119), and "common employment" is so much in use that it might come more readily to mind than "negligence" (para. 137).

Davis, Helen Miller. *Constitutions, Electoral Laws, Treaties of States in the Near and Middle East.* (Durham, N.C.: Duke University Press, 1947.) Pp. xix, 446 \$5.00.

Mrs. Davis provides in this volume a collection of constitutions of countries of the Near and Middle East, including Afghanistan, Egypt, Iran, Iraq, Lebanon, Palestine, Saudi Arabia, Syria, Transjordan and Turkey. The only country having territory in Europe to be included is Turkey. In addition to the constitutional texts the book also includes the texts of the Electoral Laws and of International Treaties and Conventions. Thus it provides the documents useful to general understanding of political law in the Near East. As a collection of documentary material the book would have gained in practical value by the addition of a good index.

Domke, Martin. *The Control of Alien Property.* Supplement to *Trading with the Enemy in World War II.* (N.Y.: Central Book Co., 1947.) Pp. viii, 334. \$7.50.

Eder, Phanor J. "Some Restrictions Abroad Affecting Corporations." (Reprint.) Pp. xxv, 388. \$10.00.

Falconbridge, J. D. *Conflict of Laws.* (Toronto: Canada Law Book Co., 1947.) Pp. xxxi, 730. \$8.00.

Federal Administrative Procedure Act and the Administrative Agencies. (N.Y. University School of Law, 1947.) Pp. viii, 630. \$7.50.

Fox, Harold G. *Monopolies and Patents.* (Univ. of Toronto Press, 1947.) Pp. xxv, 388. \$10.00.

German Major War Criminals, Trial. Part 2, 3rd December, 1945, to 14th December, 1945. Pp. xiv, 442. 6s. 6d. Part 3, 17th December, 1945, to 4th January, 1946. Pp. xi, 339. 5s. 6d. Part 4, 7th January, 1946, to 19th January, 1946. Pp. xi, 443. 6s. 6d. Part 5, 21st January, 1946, to 1st February, 1946. Pp. xi, 376. 5s. 6d. Part 6, 2nd February, 1946, to 13th February, 1946. Pp. x, 340. 5s. Part 7, 14th February, 1946, to 26th February, 1946. Pp. x, 336. 5s. Part 8, 27th February, 1946, to 11th March, 1946. Pp. x, 307. 4s. 6d. Part 9, 12th March, 1946, to 22nd March, 1946. Pp. ix, 364. 5s. 6d. Part 10, 23rd March, 1946, to 3rd April, 1946. Pp. ix, 332. 5s. Part 11, 4th April, 1946, to 15th April, 1946. Pp. ix, 389. 7s. Part 12, 16th April, 1946, to 1st May, 1946. Pp. x, 444. 7s. 6d. Part 13, 2nd May, 1946, to 13th May, 1946. Pp. ix, 372. 6s. 6d.

German Major War Criminals, Trial. Opening Speeches of the Chief Prosecutors. Pp. 173. 2s. 6d. Speeches of the Chief Prosecutors at the Close of the Case Against the Individual Defendants. Pp. 200. 3s. Speeches of the Prosecutors at the Close of the Case Against the Indicted Organizations. Pp. 143. 2s. 6d. (London: H.M. Stationery Office, 1946.)

Gregory, Charles O. *Labor and the Law.* (N.Y.: W. W. Norton and Co., 1947.) Pp. 467. 25s.

Gutteridge, H. C. *Comparative Law.* (Cambridge University Press, 1946.) Pp. xv, 208. 12s. 6d.

Hill, Martin. *Immunities and Privileges of International Officials.* (Washington: Carnegie Endowment for International Peace, 1947.) Pp. xiv, 281. \$2.50.

His Majesty's Ministers and Heads of Public Departments. (London: H.M. Stationery Office.) Pp. 44. 6d.

Indian Law Review, Vol. 1, No. 1. (Calcutta: Indian Law Publications, Ltd.) Pp. 170, xviii. Annual subscription 25s.

International Labour Conference. Reports of the Conference Delegation on Constitutional Questions. Draft Agreement between the United Nations and the I.L.O. (Montreal: I.L.O., 1946.) Pp. iv, 197. 12.

James, Eldon R. *The Statutory Criminal Law of Germany.* (Washington: Library of Congress, 1947.) Pp. xx, 276.

- Jones, J. Mervyn. *British Nationality*. (Oxford University Press, Geoffrey Cumberlege, 1947.) Pp. xxiv, 452. 30s.
- Kell, Hans. *Hugo Grotius und Johannes Selden*. (Bern: Paul Haupt, 1946.) Pp. 70.
- Koch, F. E. *The Double Taxation Conventions*, Vol. 1. (London: Stevens & Sons, 1947.) Pp. xxiv, 441. 45s.
- Lachmann, Kurt. *The Renaissance of the Individual*. (London: Charles Skilton, Ltd., 1947.) Pp. xvi, 143. 7s. 6d.
- Law Reports of Trials of War Criminals*, Vol. 1. (London: H.M. Stationery Office, 1947.) Pp. xi, 127. 2s. 6d.
- Le Gross, C. S. *Traité du Droit Contumier de l'île de Jersey*. (Les Chroniques de Jersey, 1943.) Pp. xii, 511.
- Lewin, Julius. *Studies in African Native Law*. (Cape Town: The African Bookman, 1947.) Pp. vii, 174. 15s.
- Mirkine-Guetzevitch, B. *Les Doctrines Politiques Modernes*. (N.Y.: Brentano's, Ltd., 1947.) Pp. 322. \$2.50.
- Mirkine-Guetzevitch, B. *La Quatrième République*. (N.Y.: Editions de la Maison Française, Inc., 1946.) 267.

The learned author of this little book, which has been written in exile, is already known for his work on Constitutional Law. In the present study he has applied the methods of political science. The first part is devoted to a short study of the Third Republic and of the French Parliamentary régime from 1870 to 1940. The second part covers the provisional Government which existed from that time until the establishment of the Fourth Republic. The study is inspired by the spirit of the Resistance movement upon which it is contended that the new régime has been founded and provides the hope of the future stability of the Republic. The work is one which must be included in any study of the Constitutional development of England's nearest ally and will be found of interest by any who have a sympathetic interest in the welfare of our neighbours.

- Morgenthau, Hans. J. *Scientific Man vs. Power Politics*. (Univ. of Chicago Press, 1946.) Pp. vii, 245. 16s. 6d.

This book is based upon the proposition that consideration of the general causes which led to the recent war points to a general decay in the political thinking of the Western World. The author's thesis is that this decay "is represented most typically by the belief in the power of science to solve all problems and, more particularly, all political problems which confront man in the modern age." It is the purpose of his book "to show why this belief in the redeeming powers of science is misplaced, to point to the elements in philosophic and political thought on which this belief has arisen and in which it manifests itself, and, finally, to indicate those intellectual moral factors of man" which alone can overcome problems of the social world. The learned author has provided a suggestive stimulus for thought by those who are interested in his subject.

- Nadelmann, Kurt H. "Legal Treatment of Foreign and Domestic Creditors." (Reprint from *Law and Contemporary Problems*, Duke Univ.) Pp. 16.

- New York State Legislative Annual*, 1946. (N.Y. Legislative Service Inc.) Pp. xiv, 375.

- Oppenheim's International Law*. Vol. 1. Sixth Edition. Edited by H. Lauterpacht. (London: Longmans, Green & Co., 1947.) Pp. liii, 940. 70s.

- Proceedings of the Eighth Conference of Teachers of International Law*. (Washington: Carnegie Endowment for International Peace, 1946.) Pp. xvi, 166. \$1.00.

- Ramaswamy, M. *Fundamental Rights*. (Indian Council for World Affairs—Oxford University Press, Geoffrey Cumberlege, 1946.) Pp. xx, 252. 12s. 6d.

- Red Cross, Principles and Foundations of the Work of the International Committee, 1939-1946. (Geneva, 1947.) Pp. 41.

- Renborg, Bertil A. *International Drug Control*. (Washington: Carnegie Endowment for International Peace, 1947.) Pp. xi, 276. \$2.50.

- Rooney, Miriam Theresa. "Relativism in American Law." (Reprint from *Proceedings of American Catholic Philosophical Association*, 1945.) Pp. 10.

- Rooney, Miriam Theresa. "Borrowings in Roman Law and Christian Thought." (Reprint from *The Jurist*, Vol. vi, No. 4, Oct., 1946.) Pp. 22.

Rothenburg, I. *The Newspaper*. (London: Staples Press, 1946.) Pp. 351. 35s.

Dr. Rothenburg has made an exhaustive study of the working of the Press and its laws all over the world. After a brief introduction on the liberty of the Press he proceeds to discuss such problems as anonymity, the corruption of newspapers and false news. The second part surveys the whole subject of libels and the remedies against them. Reports of legal and Parliamentary proceedings and comments upon them form the subject of another part. Circulation and advertisements lead up to a discussion of the formal requirements in newspapers and, finally, the responsibility for the contents receives consideration. The whole book is on a strictly comparative basis and provides an illuminating example of the value of the study of comparative legislation upon a subject of universal interest in daily life.

Royal Commission on Justices of the Peace. Appendices and Minutes. Pts. 1 and 2. (London: H.M. Stationery Office, 1946.)

Sarfatti, Mario. *Introducción al Estudio de Derecho Comparado*. (Mexico: Imprenta Universitaria, 1945.) Pp. xvii, 227.

Setalvad, M. C. *War and Civil Liberties*. (India: Oxford University Press, Geoffrey Cumberlege, 1947.) Pp. 86. 6s.

Simes, Lewis M., and Basye, Paul E. *Problems in Probate Law*. (Univ. of Michigan Press, 1946.) Pp. li, 782.

South Australian Industrial Reports, Vol. xix. (Adelaide: Government Printer, 1946.) Pp. vii, 398.

Spaight, J. M. *Air Power and War Rights*. Third Edition. (London: Longmans, Green & Co., 1947. Pp 523. 25s.

Srinivasan, M. N. *The Hindu Law in Mysore*. (India: Bangalore Press, Ltd., 1947.) Pp. xi, 122. Rs. 10.

Starke, J. G. *An Introduction to International Law*. (London: Butterworth & Co., 1947.) Pp. xiv, 293. 25s.

Street, Sir Arthur. *The Public Corporation in British Experience*. (London: Institute of Public Administration, 1947.) Pp. 36.

Templewood, The Viscount. *Crime and Punishment*. (London: Stevens & Sons, 1947.) Pp. 26. 2s. 6d.

Uganda, Index to the Laws in force on May 1st, 1947. (Uganda: Government Printer, 1947.) Pp. 92. Sh. 2/50.

United Nations, Charter, Statute and Rules of Court. Second Edition (May, 1947). (International Court of Justice.) Pp. 141.

Wight, Martin. *The Gold Coast Legislative Council*. (London: Faber & Faber, Ltd., 1947.) Pp. 285. 12s. 6d.

World at the Crossroads. (Chicago: World Citizens Ass., 1946.) Pp. 160. 25c.

Zannini, Walter. *L'Adesione ai Trattati Internazionali*. (Univ. of Pavia, 1946.) Pp. 78. 200 Lira.

The following periodicals have also been received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Arquivo de Direito Militar; Australian Law Journal; Bombay Law Reporter; Bulletin de Droit Tchecoslovaque; Bulletin Trimestriel de la Société de Législation Comparée; Calcutta Weekly Notes; Canadian Bar Review; Columbia Law Review; Eugenics Review; Food and Agriculture; Hindustan Review; Indian Law Review; International Law Quarterly; International Law Review; Journal de Jurisprudence Hellénique et Etrangère; Journal of the Parliaments of the Empire; Journal of the Society of Clerks-at-the-Table in Empire Parliaments; Juridical Review; L'Egypte Contemporaine; Madras Law Journal; Medico-Legal Journal; Modern Law Review; Revista de la Escuela Nacional de Jurisprudencia; Revista Juridica de la Universidad de Puerto Rico; Revue Internationale de la Croix Rouge; Revue de Science Criminelle et de Droit Penal Compare; South African Law Journal; Toronto University Law Review; Tulane Law Review; Unesco Bulletin for Libraries.